No. 98-1288-CFX Title: Village of Willowbrook, et al., Petitioners
v.
Grace Olech

Docketed: February 11, 1999 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Feb 10 1999	Petition for writ of certiorari filed. (Response due May 27, 1999)
	Mar 12 1999	Waiver of right of respondent Grace Olech to respond filed.
	Mar 17 1999	DISTRIBUTED. April 2, 1999
	Mar 30 1999	Response requested.
	Apr 19 1999	Order extending time to file response to petition until May 27, 1999.
	May 26 1999	Brief of respondent Grace Olech in opposition filed.
	Jun 8 1999	DISTRIBUTED. June 24, 1999
	Jun 21 1999	Record Requested. USCA7.
	Jun 22 1999	Certified record from USCA 7 received.
	Jun 23 1999	REDISTRIBUTED. September 27, 1999
	Sep 3 1999	Record filed.
	Sep 28 1999	Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT January 10, 2000. **********
	Nov 10 1999	Joint appendix filed.
	Nov 10 1999	Brief of petitioners Village of Willowbrook, et al. filed.
	Nov 12 1999	Brief amici curiae of International City/County Management Association, et al. filed.
	Dec 6 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 6 1999	CIRCULATED.
	Dec 13 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 13 1999	Brief of respondent Grace Olech filed.
	Dec 13 1999	Brief amicus curiae of ACLU filed.
	Dec 13 1999	Brief amicus curiae of United States filed.
	Dec 30 1999	Reply brief of petitioners Willowbrook, IL, et al. filed.
	Jan 10 2000	ARGUED.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of the VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of the VILLAGE OF WILLOWBROOK,

Petitioners,

v.

GRACE OLECH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the Respondent did not allege membership in a vulnerable group, but that ill will motivated the government to treat her differently than others similarly situated.

B. Whether the government conduct alleged in Respondent's First Amended Complaint meets the standard to state a cause of action on behalf of a "class of one," assuming the Equal Protection Clause protects such individuals.

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings before the Seventh Circuit Court of Appeals appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Village of Willowbrook, an Illinois Municipal corporation, Gary Pretzer, individually and as President of the Village of Willowbrook, and Philip J. Modaff, individually and as Director of Public Services of the Village of Willowbrook, respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 160 F.3d 386 and is reprinted at pages App. 1 to 6 of the Petitioners' Appendix. The opinion of the District Court for the Northern District of Illinois, Eastern Division, Civil No. 97 C 4935, dated April 13, 1998, is not published, but can be found at 1998 WL 196455 (N.D.Ill.) and is reprinted at pages App. 7 to 14 of the Petitioners' Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on November 12, 1998. No Petition for Rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment's Equal Protection Clause provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

I. Nature of the Case

This is an equal protection action brought by Respondent to recover for damages sustained as a result of a three-month delay in a project that connected Petitioner Village of Willowbrook's municipal water supply to her home. The Respondent has alleged that the delay occurred because Petitioners initially demanded, as a condition of extending water service, that Respondent grant to the Village a thirty-three-foot easement to improve the road along which the new water main would be installed and that the delay was maliciously caused by the Petitioners in retaliation for Respondent's filing of a separate lawsuit against the Village.

The Respondent brought the cause of action pursuant to principles set forth by the Seventh Circuit Court of

Appeals in the case of *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), alleging that Petitioners violated the Equal Protection Clause by singling her out as the object of their animosity. In *Esmail*, the plaintiff was denied a liquor license ostensibly based on minor infractions while others were granted licenses despite more severe infractions. The Seventh Circuit Court of Appeals held that the Equal Protection Clause provided a remedy despite the plaintiff's lack of membership in a vulnerable group, because "a powerful public official picked on a person out of sheer vindictiveness." 53 F.3d at 178. The court deemed the Equal Protection Clause applicable where a plaintiff could prove that "action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." 53 F.3d at 180.

II. Statement of Facts

The following facts are taken from the allegations of Respondent's First Amended Complaint. In the spring of 1995, the Petitioner Village of Willowbrook developed a plan to require all homeowners along Tennessee Avenue to be connected to the municipal water supply system and the plan was to be implemented by the spring of 1997. The Respondent resided in the Village of Willowbrook along Tennessee Avenue which was a non-dedicated road. In the spring of 1995, Respondent's well broke down and in May of 1995 Respondent requested that the Village connect her home to the municipal water system "right away." As part of the water extension project, the Village desired to dedicate Tennessee Avenue and improve it with pavement, side-

walks and public utilities. To fully improve the road, the Village requested from the Respondent in August and September, 1995, a thirty-three-foot easement on land owned by Respondent abutting Tennessee Avenue. The Respondent objected to providing a thirty-three-foot easement and in November of 1995, the Village agreed to require a fifteen-foot easement and a temporary construction easement of an additional five feet for the water extension project. The project was completed and water was delivered to Respondent's home in March of 1996.

The Respondent's Amended Complaint does not allege that any other Village residents who lived adjacent to non-dedicated unimproved roads were not asked for thirty-three-foot easements to improve the roads as a condition of the delivery of public water. Nor does the Amended Complaint allege that Tennessee Avenue was ultimately dedicated or improved as part of the water connection project. The Complaint alleged that Petitioners violated Respondent's equal protection rights by initially demanding the thirty-three-foot easement, a demand not made of others similarly situated. It was further alleged that ill will generated by a separate lawsuit filed by Respondent against the Village motivated Petitioners to treat Respondent differently.

III. Course of Proceedings and Disposition Below

Respondent's original Complaint was withdrawn and Petitioners' Motion to Dismiss the First Amended Complaint was granted on April 13, 1998. Respondent filed a timely Notice of Appeal on May 13, 1998, and on November 12, 1998, the Seventh Circuit Court of Appeals issued its opinion reversing the District Court and remanding the case to the District Court for further proceedings.

The Court of Appeals held that Respondent's allegations that Petitioners' demand for a thirty-three-foot easement when, according to Respondent, similarly-situated property owners had given fifteen-foot easements, and that Petitioners did so to retaliate against the Respondent for filing a prior lawsuit against the Village were sufficient to state a cause of action for denial of equal protection. The court clarified its earlier decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), by stating that a government can violate the Equal Protection Clause if it acts out of ill will, even though its conduct may not constitute an orchestrated campaign of harassment directed against the Respondent and despite Respondent's lack of membership in a "class."

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH AN OPINION EMANATING FROM THE SIXTH CIRCUIT COURT OF APPEALS INSOFAR AS IT RECOGNIZES AN EQUAL PROTECTION CLAIM BROUGHT ON BEHALF OF A "CLASS OF ONE."

In its opinion below, the Seventh Circuit Court of Appeals applied the equal protection-based "class of one" claim first recognized by the Seventh Circuit Court of Appeals in *Esmail v. Macrane,* 53 F.3d 176 (7th Cir. 1995). In *Esmail,* the plaintiff, owner of a liquor store,

claimed a violation of his equal protection rights through a campaign of harassment by the defendant, Mayor of the City of Naperville. The plaintiff alleged that the defendant repeatedly attempted to deny him a liquor license and caused the police to harass him at every opportunity. This "campaign of vengeance" was in retaliation for plaintiff's past success in having a liquor license revocation reduced to a brief suspension by the state liquor control commission, the plaintiff's advertising campaign against the sale of liquor to minors, and the plaintiff's prior withdrawal of political and financial support from the mayor. The plaintiff claimed that other liquor license applicants similarly situated received licenses while he, the victim of an orchestrated campaign of official harassment motivated by the mayor's ill will, was denied a license. The court concluded that the plaintiff had stated a Fourteenth Amendment equal protection claim, despite the lack of any allegation that he was victimized because of his membership in a suspect class. Rejecting defendant's contention that the Equal Protection Clause did not favor a "class of one," the court stated:

> Neither in terms nor interpretation is the [Equal Protection] Clause limited to protecting members of identifiable groups. It has long been understood to provide a kind of last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives . . . 53 F.3d at 180.

The Sixth Circuit Court of Appeals and a district court in the Fourth Circuit have rejected the *Esmail* doctrine. *Futernick v. Sumpter Township,* 78 F.3d 1051 (6th Cir. 1996); *Edwards v. City of Goldsboro,* 981 F.Supp. 406, 410 (E.D.N.C. 1997); and *Dubuc v. Green Oak Township,* 958 F.Supp. 1231, 1236-37 (E.D. Mich. 1997).

In *Futernick,* the plaintiff sued an official from the Michigan Department of Public Health alleging an equal protection violation. Plaintiff contended that defendant required that only he, and not others similarly situated, incur more than $700,000 in costs to modify sewage treatment facilities on his commercial property. The district court granted defendant's 12(b)(6) Motion to Dismiss and the Sixth Circuit Court of Appeals affirmed, characterizing plaintiff's action as a selective enforcement equal protection claim. The court affirmed the dismissal of the complaint, noting that plaintiff did not claim to be a member of a vulnerable group. Refusing to expand equal protection claims to cover single-member classes, the court observed:

> The nature of the right to equal protection also counsels against expanding a federal right to protection from non-group animosity on the part of local officials. It is clearly not a violation of equal protection if a local regulator, faced with limited resources, picks people to regulate in a perfectly random manner. *Supra n.8.* Similarly, the presence of personal animosity should not turn an otherwise valid enforcement action into a violation of the Constitution. From a constitutional perspective, personal animosity not related to group identity or the exercise of protected rights is as *random* as the role of a dice. There is no constitutionally significant category of people that have a greater or lesser chance of being affected by it. The Constitution's protection begins only when the *incidence* of the burden of regulation becomes constitutionally

suspicious. (Emphasis in original.) 78 F.3d 1051 at 1059.

The court cautioned that expansion of the Equal Protection Clause to single-member classes would result in a flood of litigation:

> The sheer number of possible cases is discouraging. Legislatures often combine tough laws with limited funding for enforcement. A regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law. As a result, even a moderately artful complaint could paint almost any regulatory action as both selective and mean-spirited. 78 F.3d 1051 at 1058.

Finally, the court reasoned that victims of discriminatory practices of local regulators had recourse in state courts and political processes. 78 F.3d at 1058.

In *Edwards,* the plaintiff, a police officer, brought an equal protection claim against his employer, arguing that he was arbitrarily denied an opportunity for secondary employment. Dismissing plaintiff's complaint, the district court observed that plaintiff could not allege that he was selectively treated based on membership in a vulnerable group. The court rejected *Esmail*'s class-of-one doctrine because it was "far-removed from the motives behind the Equal Protection Clause of the Fourteenth Amendment . . ." 981 F.Supp. 406 at 410. The court cited this Court's opinion in *Palmer v. Thompson,* 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), for the proposition that the Equal Protection Clause was intended to safeguard classes, such as minorities, against discriminatory action by the state,

and not individuals who are not members of a suspect class.

In *Dubuc,* the plaintiff brought a Fourteenth Amendment claim arguing that the township zoning board and related officials treated him differently than other township residents, in effect treating him as an arbitrary "class of one," by strictly enforcing ordinances against him that impeded his efforts to develop commercial property. The plaintiff argued that defendants, motivated by ill will, pursued a policy of denial of governmental services to him alone. The plaintiff did not claim that defendants' treatment of him interfered with his exercise of a constitutional right, but rather that defendants singled him out for disparate treatment because of a past lawsuit he filed against the state. The district court cited *Futernick* in rejecting the application of the *Esmail* doctrine. The court held that equal protection prohibits selective enforcement only against arbitrary classifications of groups, not against any particular individual.

Even the Seventh Circuit Court of Appeals has, as recently as 1995, reiterated the long-held notion that the Equal Protection Clause was not intended to protect individuals who do not claim membership in a protected class. *Herro v. City of Milwaukee,* 44 F.3d 550 (7th Cir. 1995). In *Herro,* the Seventh Circuit rejected the "class of one" equal protection claim brought by an unsuccessful applicant for a tavern license. Plaintiff brought suit alleging that defendants had been motivated by personal animus to treat him unlike other applicants had been treated. The Court of Appeals affirmed summary judgment for the defendants holding that a person

bringing an equal protection claim must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual. 44 F.3d at 552. To the suggestion that the Equal Protection Clause extended to protect a "class of one," the court responded:

> It is true that older cases from this Circuit suggest a broader reach to the Equal Protection Clause. See, *e.g. Falls v. Town of Dyer,* 875 F.2d 146 (7th Cir. 1989) (holding that a class of only one member can still complain of discrimination against his tiny class if he can show that a combination of legislative and executive action has singled him out for unique treatment.) Yet we think that the more recent cases, particularly *Albright*, place additional burdens on plaintiffs to identify the classification behind even a 'class of one.' 44 F.3d at 553.

Cited by the *Herro* court was a 1990 decision issued by the Seventh Circuit Court of Appeals in *New Burnham Prairie Homes, Inc. v. Village of Burnham,* 910 F.2d 1474 (7th Cir. 1990). In *New Burnham,* the plaintiff sought building permits from the defendant for the construction of a multiple-family and single-family development. Plaintiff's permits were delayed, he alleged, because defendants feared that blacks would reside in the development. Plaintiff also alleged that defendants demanded that he pay a disproportionate share of the cost of a retention pond intended to serve his and other developments. Plaintiff claimed that another developer, a former village attorney, was treated more favorably with respect to the cost of the retention pond and the number of documents to be submitted in support of the permit request. Plaintiff

sued defendants, claiming, among other things, a denial of equal protection because he had been treated differently than similarly-situated developers.

In affirming summary judgment on the equal protection claim, the Seventh Circuit Court of Appeals noted that the fundamental flaw in the claim was plaintiff's lack of membership in a vulnerable group. Citing this Court's decision in *Personnel Administrator v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979), the court observed:

> In order to assert a constitutional claim based on violation of equal protection, a complaining party must assert disparate treatment based on their membership in a particular group. Discrimination based merely on *individual,* rather than group, reasons will not suffice. 910 F.2d at 1481. (Emphasis in original.)

See also, *Smith v. Town of Eaton, Ind.,* 910 F.2d 1469, 1472 (1990) (equal protection claim must be based on intentional discrimination against the plaintiff because of his membership in a particular class, not merely because he was treated unfairly as an individual).

The central purpose of the Equal Protection Clause "is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). The Fourteenth Amendment forbids such conduct on the principle that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943).

The ultimate goal of the Equal Protection Clause has been "to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti,* 466 U.S. 429, 432, 104 S.Ct. 1879, 1881-82, 80 L.Ed.2d 421 (1984). Therefore, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand Constructors v. Pena,* 515 U.S. 200, 230, 115 S.Ct. 2097, 2114, 132 L.Ed.2d 158 (1995).

It is true that in enforcing the Equal Protection Clause of the Fourteenth Amendment, this Court has broadened the protections conferred beyond prohibiting racial discrimination. It has been held to prohibit unjustified discrimination on the basis of gender, *United States v. Virginia,* 518 U.S. 515, 534 (1996); alienage, *Truax v. Raich,* 239 U.S. 33, 39, 36 S.Ct. 7, 60 L.Ed. 131 (1915); parentage, *Galona v. American Guarantee and Liability Insurance Company,* 391 U.S. 73, 76, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968); criminal conviction, *Rinaldi v. Yeager,* 384 U.S. 305, 308-09, 86 S.Ct. 1497, 16 L.Ed.2d 1577 (1966); and type of business, *Atchison, Topeka & Santa Fe Railway v. Fosburg,* 238 U.S. 56, 62, 35 S.Ct. 675, 59 L.Ed. 1199 (1915). Though the Equal Protection Clause is no longer limited to protecting against racial discrimination, its ultimate objective is still clear; the protection of vulnerable groups.

While judicial interpretations of the concept of equal protection have been far from uniform, they generally have focused on whether the plaintiff was a member of a victimized class. *See, Albright v. Oliver,* 975 F.2d 343,

348 (7th Cir. 1992), aff'd on other grounds, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). Expansion of the Equal Protection Clause to single plaintiffs would trivialize it by potentially elevating every indignity suffered by any individual to an equal protection claim. In *Booher v. United States Postal Service,* 843 F.2d 943, 944 (6th Cir. 1988), it was noted that the equal protection concept does not duplicate common law tort liability by conflating all persons not injured into a preferred class. For this reason, the Sixth Circuit held in *Joyce v. Mavromatis,* 783 F.2d 56, 57 (6th Cir. 1986), that the plaintiff failed to state a claim under the Equal Protection Clause because he was not a member of a class or group singled out for discriminatory treatment.

It is submitted by Petitioners that this Honorable Court should review this case to define the scope of the Equal Protection Clause of the Fourteenth Amendment. Each day public officials exercise their discretion in making decisions concerning the provision of public services. The lack of harmony between the *Esmail* doctrine and the decisions cited herein leave public officials and citizens uncertain as to their rights and remedies when making or challenging these decisions. Review by this Court is essential to clarify this issue and facilitate a uniform application of the Equal Protection Clause thereby minimizing litigation which, currently, leads to varying interpretations and inconsistent results.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW AUTHORIZES AN UNWARRANTED EXPANSION OF A VERY NARROW CAUSE OF ACTION FOR EQUAL PROTECTION ON BEHALF OF A "CLASS OF ONE."

In the event that this Court finds the *Esmail* doctrine to be a valid interpretation of the Equal Protection Clause, the Petitioners submit that the opinion below represents an unwarranted expansion of the narrow cause of action set forth in *Esmail*. In *Esmail*, the court reasoned that the cause of action recognized therein stemmed from the Equal Protection Clause's "last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives." 53 F.3d at 180. The cause of action was rooted, the court held, in governmental conduct that was malicious, unrelenting, motivated by "malignant animosity," and "wholly unrelated to a legitimate public objective." 53 F.3d at 179-80. The standard for governmental conduct established by *Esmail* required proof of an orchestrated campaign of official harassment aimed at doing significant injury to a harmless plaintiff. Plaintiff's burden, according to *Esmail*, was to prove that the defendants' actions reflected a spiteful effort to "get him" for reasons wholly unrelated to any legitimate state objective.

The necessary components of the cause of action can be gleaned from the following statements in *Esmail*:

> In particular, Esmail is not complaining merely that equally or more guilty liquor licensees than he are treated more leniently. He is complaining about an *orchestrated campaign of official harassment* directed against him out of sheer malice. 53 F.3d 176 at 179. (Emphasis added.)

* * *

> What it (the Equal Protection Clause) does require, and what Esmail may or may not be able to prove, is that the action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons *wholly unrelated to any legitimate state objective*. 53 F.3d at 180. (Emphasis added.)

* * *

> If the power of government is brought to bear on a *harmless individual* merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court. 53 F.3d at 179. (Emphasis added.)

Thus, the cause of action requires (1) an orchestrated campaign of official harassment (2) directed at a "harmless" individual and (3) wholly unrelated to any legitimate state objective.

A. Respondent's Allegations Do Not Demonstrate an Orchestrated Campaign of Official Harassment.

In *Esmail*, the "orchestrated campaign of official harassment directed against [plaintiff] out of sheer malice" was characterized as a "campaign of vengeance." This campaign included attempts to deny the plaintiff his liquor license as well as efforts to harass plaintiff and his employees with constant intrusive surveillance, repeated police stops during which the plaintiff was forced to undergo field sobriety tests and in the filing of false criminal charges against plaintiff. 53 F.3d at 178.

In this case, however, rather than demonstrating that Petitioners attempted to "get" the Respondent, the Amended Complaint reveals that Petitioners initially, and for a short time, sought an easement of sufficient width to improve a roadway with pavement, sidewalks and public utilities. Such improvements would benefit residents, including the Respondent, much more than they would benefit the government. Respondent, apparently not desirous of such improvements, objected to the thirty-three-foot easement, but ultimately agreed to a fifteen-foot easement, and another five-foot temporary construction easement. Petitioners' conduct in this regard was hardly an orchestrated campaign of harassment, or an effort to "get" the Respondent, but merely a legitimate effort to improve a road obviously used by the Respondent with great frequency. *Esmail* is distinguishable in that the defendant there had no such public improvement or purpose in mind when attempting to deprive the plaintiff of his business license.

The Village's lack of malice and intent to harass is evidenced by the fact that it abandoned its initial request within three months and agreed to a permanent easement of fifteen feet and a temporary easement of five feet and completed the water extension project within nine months of Respondent's request and a full year before the project was intended to be completed. The initial thirty-three-foot easement request was part of a legitimate attempt to improve Tennessee Avenue and therefore cannot amount to a denial of equal protection. In *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis,* 101 F.3d 1179 (7th Cir. 1996), the court reasoned that even though a class can consist of a single member, the

plaintiff must still demonstrate the defendant's conduct to be irrational and arbitrary.

At worst, Respondent's allegations show that the Respondent was a random victim of governmental error; the Village initially asked the Respondent for a thirty-three-foot easement, but later obtained advice from counsel that a total of twenty feet of easement would suffice. A claim for violation of equal protection will not lie where the governmental action was taken out of error, neglect or mistake. *Ciechon v. City of Chicago,* 686 F.2d 511, 523 (7th Cir. 1982). To give rise to a constitutional grievance, the government conduct must be rooted in design and not derived merely from error or fallible judgment. *Hamlyn v. Rock Island County Metropolitan Mass Transit District,* 986 F.Supp. 1126, 1133 (C.D.Ill. 1997).

B. Petitioners' Actions Were Related to a Legitimate State Objective.

The *Esmail* court explained that the Equal Protection Clause does not require government to treat all identically-situated individuals identically, but prohibits unequal treatment which is solely the result of vindictiveness. Thus, unequal treatment does not necessarily violate the Equal Protection Clause, except when the distinctive treatment has no rational relation to a legitimate government interest. *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, 101 F.3d 1179, 1182 (7th Cir. 1996) (unequal treatment of similar persons does not offend the Equal Protection Clause where a rational basis for the government action exists).

Respondent claims that the Petitioners created a class of one by singling her out for disparate treatment. Where the government is alleged to have made such a "classification," it is entitled to a presumption that its classification is rational and constitutional. *Wroblewski v. City of Washburn,* 965 F.2d 452, 459 (7th Cir. 1992). To overcome this presumption of rationality, the Respondent must establish in his complaint that the facts which formed the basis of the classification could not reasonably be conceived to be true by the governmental decision-maker. *Wroblewski v. City of Washburn,* 965 F.2d 452, 459 (7th Cir. 1992). Where a rational basis for the government conduct emerges from the allegations of the complaint, the complaint cannot survive a motion to dismiss. *Wroblewski v. City of Washburn,* 965 F.2d 452, 460 (7th Cir. 1992).

Here, the allegations of Respondent's Amended Complaint reveal there to be a rational basis for Petitioners' conduct. The desire to extend and improve the infrastructure of the road in conjunction with the installation of the water delivery system was certainly a legitimate government objective. In *Esmail,* the sole objective was to deprive the plaintiff of his license. Here, it is clear that it was not the government's sole objective to deprive Respondent of water. The Respondent did receive the water, albeit not "right away." The delay in completing the water delivery system was attributable to legitimate government efforts to improve the road with pavement, sidewalks and public utilities in conjunction with the water extension project.

Though Respondent attempts to draw the inference that her alleged unequal treatment was due to her

status as a claimant against the Village in another lawsuit, that conclusion does not logically follow from the allegations of the Amended Complaint. The Amended Complaint pleads a rational basis for Petitioners' conduct; the desire to improve a street used by the Respondent in conjunction with the installation of a water main under that street. *Esmail* recognized that the state's act of singling out an individual for differential treatment does not itself give rise to the cause of action. It is the malicious and spiteful motivation that forms the basis of the cause of action. Even if such improper motivation is alleged, the cause of action does not survive a motion to dismiss where, as here, a legitimate motivation for the governmental action exists.

It is submitted by Petitioners that the decision issued by the Court of Appeals in this case will trigger innumerable lawsuits against municipalities and public officials brought by citizens claiming they were treated differently by a governmental entity motivated by ill will. The opinion below does not require the Respondent to plead and prove that the government's primary objective was to harm a citizen or that the government's actions were not related to a legitimate objective. Nor does the opinion below require the "orchestrated campaign of official harassment" originally required by *Esmail.* The ruling by the Court of Appeals can be interpreted to allow any citizen claiming to suffer even trivial indignities to avail himself of the protection of the Fourteenth Amendment.

CONCLUSION

Wherefore, Petitioners respectfully request that this Honorable Court grant this Petition for a Writ of Certiorari and review and reverse the decisions of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2235

GRACE OLECH,

Plaintiff-Appellant,

v.

VILLAGE OF WILLOWBROOK, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 4935—**George M. Marovich**, *Judge.*

ARGUED OCTOBER 8, 1998—DECIDED NOVEMBER 12, 1998

Before POSNER, *Chief Judge*, and CUMMINGS and ESCHBACH, *Circuit Judges.*

POSNER, *Chief Judge.* In *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), we held that the equal protection clause provides a remedy when "a powerful public official picked on a person out of sheer vindictiveness." *Id.* at 178. Although the clause is more commonly invoked on behalf of a person who either belongs to a vulnerable minority or is harmed by an irrational difference in treatment, it can also be invoked, we held, by a person who can prove that "action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate

state objective." *Id.* at 180. See also *Indiana State Teachers Ass'n v. Board of School Commissioners*, 101 F.3d 1179, 1181-82 (7th Cir. 1996); *Ciechon v. City of Chicago*, 686 F.2d 511, 522-24 (7th Cir. 1982); *Batra v. Board of Regents*, 79 F.3d 717, 721-22 (8th Cir. 1996); *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen*, 932 F.2d 89, 94 (1st Cir. 1991); *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980). Grace Olech brought suit against the Village of Willowbrook and two of its high officials in reliance on *Esmail*'s principle and was tossed out on the defendants' Rule 12(b)(6) motion on the ground that the facts pleaded in her complaint did not fit the mold of *Esmail*.

Olech and her husband, now deceased, used to get their water from a well on their property. But the well broke down and they asked the Village of Willowbrook, where their property is located, to connect their home to the municipal water system. The Village agreed, but besides requiring the Olechs to pay the cost of the hook up (which apparently is a standard requirement and one with which they complied without complaining) told them they would have to grant the Village not the customary 15-foot easement to enable servicing of the water main but a 33-foot easement to permit the Village to widen the road on which they live. The Olechs refused, and after three months the Village relented, acceded to the smaller easement, and hooked up the water. But meanwhile the Olechs had been without water and as a consequence suffered various types of damage for which they seek redress in this suit.

So far in our recitation of the allegations of the complaint there is nothing to suggest a denial of equal protection. But the complaint goes on to allege that the defendants' motivation for insisting on the nonstandard easement was the fact that the Olechs earlier had sued the Village, and obtained damages, for flood damage caused by the Village's negligent installation and enlarge-

ment of culverts located near the Olechs' property. See *Zimmer v. Village of Willowbrook*, 610 N.E.2d 709, 712 (Ill. App. 1993). The complaint alleges that the lawsuit generated "substantial ill will" that caused the Village to depart from its normal policy of demanding only a 15-foot easement in exchange for providing municipal water and instead to decide to pave over a chunk of the Olechs' property. A letter is cited in which the Village's lawyer conceded, after the Village had backed down and agreed to require only the 15-foot easement, that that easement "will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village." For three months the Olechs had been treated differently, to their detriment, from all other property owners in the Village only because their meritorious suit against the Village had angered Village officials. These are just allegations and may be false. But as the defendants acknowledge, we must assume they are true for purposes of this appeal. The defendants have yet to file an answer or any other pleading that denies any allegation of the complaint.

Nevertheless the district judge granted the defendants' motion to dismiss because the complaint didn't allege an "orchestrated campaign of official harassment" motivated by "sheer malice," quoting our opinion in *Esmail*. 53 F.3d at 179. Nothing in the *Esmail* opinion, however, suggests a *general* requirement of "orchestration" in vindictive-action equal protection cases, let alone a legally significant distinction between "sheer malice" and "substantial ill will," if, as alleged here, the ill will is the sole cause for the action of which the plaintiff complains. Esmail was complaining that he had been denied liquor licenses on the basis of trivial infractions for which no other applicant had ever been denied a license. Standing by itself, this difference in treatment would not have been a denial of equal protection, but merely an example of uneven law

enforcement, than which nothing is more common nor, in the usual case, constitutionally innocent. E.g., *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Esmail v. Macrane, supra*, 53 F.3d at 179; *Falls v. Town of Dyer*, 875 F.2d 146, 148-49 (7th Cir. 1989); *Hameetman v. City of Chicago*, 776 F.2d 636, 641 (7th Cir. 1985). The plaintiff had to and did allege that the denial of his applications was the result not of prosecutorial discretion honestly (even if ineptly—even if arbitrarily) exercised but of an illegitimate desire to "get" him because of lawful actions by him that had aroused the mayor's ire. It was in that context that we pointed out that the complaint alleged much more than uneven enforcement.

The present case is not one of uneven enforcement. The Village does not deny that it has a legal obligation to provide water to all its residents. If it refuses to perform this obligation for one of the residents, for no reason other than a baseless hatred, then it denies that resident the equal protection of the laws. And that is sufficiently alleged. While it may have been important in *Esmail* that the plaintiff alleged an "orchestrated campaign," it was not important here. The district judge did not try to hook up the requirement of an "orchestrated campaign" to the language or policy of the equal protection clause, and we cannot think of any hook either. Nor is important that the oppression of the plaintiff was merely temporary. Many temporary deprivations are actionable even under provisions of the Constitution that, unlike the equal protection clause, require that the deprivation be of liberty or property. E.g., *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987); *In re Special March 1981 Grand Jury*, 753 F.2d 575, 580 (7th Cir. 1985). And to be deprived of water for three months is a potentially more serious deprivation than many permanent deprivations that we can think of.

Of course we are troubled, as was the district judge, by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case. But bear in mind that the "vindictive action" class of equal protection cases requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant. If the defendant would have taken the complained-of action anyway, even if it didn't have the animus, the animus would not condemn the action; a tincture of ill will does not invalidate governmental action. Maybe the present case can be disposed of on this or some other ground well short of trial; it cannot be disposed of on the pleadings.

And especially not on the defendants' alternative ground, that their action was not the cause of the plaintiff's lacking water for three months. They point out that had her well not broken down, which is not contended to be their fault, she would have had an uninterrupted supply of water no matter what the Village failed to do. This is a ridiculous argument. It is like saying that if she didn't live in the Village of Willowbrook she wouldn't (in all likelihood) have had a water problem. That is blaming the victim with a vengeance. Every injury has a multitude of antecedent conditions. When one of them is the defendant's culpable fault, he is not excused from liability on the ground that if some other, innocent condition hadn't been present (such as Columbus's discovery of America) no injury would have occurred. E.g., *Movitz v. First National Bank*, 148 F.3d 760, 762 (7th Cir. 1998); *United States v. Feliciano*, 45 F.3d 1070, 1075 (7th Cir. 1995); *Milam v. State Farm Mutual Automobile Ins. Co.*, 972 F.2d 166, 169 (7th Cir. 1992).

REVERSED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: November 12, 1998

BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable JESSE E. ESCHBACH, Circuit Judge

No. 98-2235

GRACE OLECH,

Plaintiff-Appellant

v.

VILLAGE OF WILLOWBROOK an Illinois municipal corporation, GARY PRETZER, individually and as President of Village of Willowbrook and PHILIP J. MODAFF, individually and as Director of Public Services for Village of Willowbrook,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 97 C 4935, George M. Marovich, Judge

The judgment of the District Court is REVERSED, with costs, in accordance with the decision of this court entered on this date.

[Dated April 13, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH, Plaintiff, vs. VILLAGE OF WILLOWBROOK, et. al. Defendants.	)	No. 97 C 4935 Judge George M. Marovich

MEMORANDUM OPINION AND ORDER

Plaintiff Grace Olech ("Olech") filed this action, pursuant to 42 U.S.C. § 1983, against Defendants the Village of Willowbrook ("Willowbrook" or the "Village"), Gary Pretzer ("Pretzer"), individually and as President of Willowbrook, and Philip Modaff ("Modaff"), individually and as Director of Public Services for Willowbrook, alleging that Defendants violated her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants have filed a motion to dismiss Olech's Complaint pursuant to Fed. R. Civ. P. 12(b) (6). For the reasons set forth below, the Defendants' motion to dismiss is granted.

BACKGROUND

Olech is the 72-year-old owner and resident of a single-family home on Tennessee Avenue in Willow-

brook, Illinois.[1] Olech's home is located between two other homes on Tennessee Avenue—owned by Rodney and Phillis Zimmer (the "Zimmers") on the south and Howard Brinkman ("Brinkman") on the north.

Up until the spring of 1995, Olech and her late-husband obtained their potable water from a private well located on their property. In the spring of 1995, however, the Olechs' well broke down and was allegedly beyond repair. Because the Willowbrook water main extended only to the northern boundary of Brinkman's property—the Olechs' neighbor to the north on Tennessee Avenue—in order to obtain water, the Olechs were forced to hook an overground rubber hose up to the well of the Zimmers—their neighbors to the south on Tennessee Avenue.

The Olechs apparently viewed this as a "temporary solution" to their water problem. As such, the Olechs, the Zimmers and Brinkman allegedly asked Willowbrook to hook their homes up "right away" to the Willowbrook municipal water system. Olech contends that she explained her water problems (the broken well) to Modaff, the Director of Public Services for Willowbrook, and notified him that the overground hose would not work in the winter when the temperature fell below freezing.

Olech contends that after alerting Willowbrook to her problem, the Village began work on extending the water main to hook up Olech's home and the homes of

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[1] Since the time that the events at issue in this suit took place Olech's husband, Thaddeus Olech, has died of causes unrelated to this action.

her two neighbors. Willowbrook conditioned its work on an agreement by Olech and her neighbors to each pay one-third of the estimated cost of the project. By July 12, 1995, Willowbrook had received the required payments of $7,012.67 from Olech and her neighbors.

However, in August of 1995, Willowbrook informed Olech and her neighbors that in addition to their cash payments for the project, Willowbrook also required them to grant the Village a 33-foot easement along Tennessee Avenue. According to Olech, the Plat of Easement created by Willowbrook required property owners on both sides of Tennessee Avenue—the Olechs, Zimmers and Brinkman live on the west side of Tennessee Avenue—to dedicate a 33-foot strip of property along Tennessee Avenue for public roadway purposes. Specifically, Willowbrook wanted to install a paved roadway with sidewalks and public utilities on Tennessee Avenue.

The Olechs and their neighbors refused to grant Willowbrook the 33-foot easement that it required. As a result of the property owners' refusal to grant the easement, no progress was made on the water project. Finally on November 10, 1995, Willowbrook's attorney prepared a letter in which the Village withdrew its demand for a 33-foot easement and indicated to Olech and her neighbors that it would proceed with the water main extension if they would grant Willowbrook a 15-foot easement for the water main and the related water service line used to connect the homes. According to Olech's Complaint, the letter from Willowbrook's attorney stated, in part:

> [A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5')

> on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village.

(Compl. at ¶ 26.) Olech and her neighbors agreed to grant Willowbrook the 15-foot easement and the water project was completed approximately four months later on March 19, 1996.

Meanwhile, in November 1995, the overground hose used by the Olechs to connect to their neighbor's well froze. As a result, Olech and her husband were without running water from November 1995 through March 19, 1996.

Olech filed her Complaint with this Court alleging that Willowbrook violated her rights under the Equal Protection Clause by initially requiring that she and her neighbors grant the Village a 33-foot easement while only requiring a 15-foot easement from other Village residents.[2] Olech contends that the reason that she and her neighbors were singled out by Willowbrook was because they had each filed state-court lawsuits against the Village six years earlier in August of 1989.[3] Olech alleges that these lawsuits made Willowbrook and its officers and employees "look bad." Olech further alleges

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[2] Olech bases this allegation on the letter she received from Willowbrook's attorney reporting that a 15-foot easement was "consistent with Village policy regarding all other property in the Village."

[3] The Olechs, the Zimmers and Brinkman filed three state-court suits against Willowbrook for damage that resulted from the flooding of their property by storm water. The Olechs and Zimmers were successful in their suits against Willowbrook. Brinkman's claims were dismissed for want of prosecution.

that these lawsuits generated "substantial ill will" on the part of Willowbrook and its officers and employees. This "ill will," according to Olech, is what ultimately motivated Willowbrook to require a larger easement (33 feet) from her and her neighbors than what is normally required (15 feet) from other property owners in the Village. Olech maintains that the three-month delay, which resulted from Willowbrook's request for the larger easement, is what ultimately caused her and her husband to be without running water during the winter of 1995-1996. Thus, it is this three-month delay that Olech claims deprived her of her rights under the Equal Protection Clause.

DISCUSSION

I. Standards For a Motion to Dismiss

When considering a motion to dismiss, the Court examines the sufficiency of the complaint, not the merits of the lawsuit. *See Triad Assoc. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989). "[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence that supports the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A motion to dismiss will be granted only if the Court finds that the plaintiff can prove no set of facts that would entitle him to relief. *See Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 432 (7th Cir. 1993); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On a motion to dismiss, the Court draws all inferences and resolves all ambiguities in the plaintiff's favor and assumes that all well-pleaded facts are true. *See Dimmig v. Wahl*, 983 F.2d 86, 86 (7th Cir. 1993).

II. Violation of the Equal Protection Clause

The Seventh Circuit has explained that there are two common varieties of equal protection claims: (1) those in which the plaintiff claims that she is a member of a vulnerable group (principally racial) and has been singled out for unequal treatment on that basis; and (2) those involving challenges to laws or rules that supposedly draw irrational distinctions. *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). A third and more unusual claim involves "orchestrated campaigns of official harassment directed against [a plaintiff] out of sheer malice." *Id.* at 179. Olech contends that her Complaint belongs to this highly unusual class of equal protection claims.

In *Esmail,* a Naperville liquor dealer (Esmail) alleged that he was denied the renewal of his liquor license as a result of an "orchestrated campaign" by the mayor. Specifically, Esmail alleged that the mayor, who is also Naperville's liquor control commissioner, not only denied his repeated applications for a liquor license, but also instituted a "campaign of vengeance" against him which consisted of causing the Naperville police to harass him and his employees with "constant, intrusive surveillance, in causing the police to stop his car repeatedly and forc[ing] him to undergo field sobriety tests, and in causing false criminal charges to be lodged against him." *Id.* at 178. The court summarized that Esmail's "charge here is that a powerful public official picked on a person out of sheer vindictiveness." *Id.*

After reviewing Esmail's 22-page Complaint, the Seventh Circuit declared that:

> If the power of the government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court.

Id. at 179.

While this Court is sympathetic to alleged wrong suffered by Olech and her husband, the Court is not convinced that Olech's Complaint describes the "malignant animosity" or the "orchestrated campaign of official harassment" complained of in *Esmail.* Even accepting Olech's allegations that her state-court action generated "ill will" in Willowbrook against her and her neighbors, this Court is unable to conclude that the Village ever "harassed" or "picked on" Olech and her neighbors "out of sheer vindictiveness" as in *Esmail.* At most, Olech's Complaint alleges that the Village acted unreasonably and out of "ill will" in requiring her to give up an extra 18 feet of easement space that was not required of other property owners. This hardly qualifies as the same type of conduct alleged to have been suffered in *Esmail.* Moreover, based on the allegations contained in Olech's Complaint, it appears that the reason that the Village wanted 33 feet of easement rather than 15 feet of easement was so that it would be able to install a paved public roadway along Tennessee Avenue with sidewalks and public utilities—something it apparently could not do without the additional 18 feet of space. (Compl. at ¶ 25.) Nothing in Olech's Complaint—apart from conclusory assertions—indicates that Willowbrook was acting out of vindictiveness or in retaliation for Olech's prior lawsuit. *See Trask v. Rios,* 1995 WL 758410, at *5 (N.D. Ill. Dec. 19, 1995) ("'Harass,'

'discriminate,' and 'retaliate' are words to which legal significance attaches. Alone, they are legal conclusions that do not place defendants on notice of the circumstances from which the accusations arise and therefore are inappropriate pleading devices."); *Palda v. General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995) ("A complaint [that] consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)."). Assuming that all of the allegations contained in Olech's Complaint are true, it appears to this Court that there may be "ill will" on the part of both Willowbrook and Olech. Nevertheless, this Court finds that the alleged treatment of Olech by Willowbrook and its officers—as well as the alleged motivation behind this treatment—is not sufficient to state an equal-protection claim under the standards as set forth in *Esmail*.

CONCLUSION

For the foregoing reasons, this Court grants Defendants' motion to dismiss.

ENTER:

/s/ George M. Marovich
GEORGE M. MAROVICH
UNITED STATES DISTRICT COURT

DATE: /s/ April 13, 1998

(2)

No. 98-1288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of the VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of the VILLAGE OF WILLOWBROOK,

Petitioners,

v.

GRACE OLECH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

I. Nature of the Case

The Respondent, Grace Olech ("Olech" or "Mrs. Olech"), filed this action against the Petitioners, the Village of Willowbrook, an Illinois municipal corporation ("Willowbrook"), Gary Pretzer, individually and as President of Willowbrook ("Pretzer"), and Philip J. Modaff, individually and as Director of Public Services of Willowbrook ("Modaff"). The action was filed under 42 U.S.C. §1983 and sought damages based on the violation of Mrs. Olech's rights under the Equal Protection Clause of the United States constitution. The Petitioners filed a motion to dismiss Mrs. Olech's Amended Complaint under Fed.R.Civ.P. 12(b)(6), and the district court granted that motion and entered judgment for the Petitioners. The Court of Appeals for the Seventh Circuit reversed, and the case has been redocketed in the district court.

II. Statement of Facts

This action was commenced on July 11, 1997, when Grace Olech filed her Complaint (Doc. 1-1) in the United States District Court for the Northern District of Illinois, Eastern Division, against Willowbrook, Pretzer, and Modaff. (References will be to the document numbers placed on the matters in the record by the clerk of the court and to page numbers of the respective documents. In the case of the Amended Complaint, a copy of which is set forth in the Appendix hereto, references will be to paragraphs of the Amended Complaint.) On October 8, 1997, Mrs. Olech filed an

Amended Complaint (Doc. 8), having received leave of court to do so. (Doc. 7)

In her Amended Complaint, Mrs. Olech alleged that she was a citizen of the United States and a resident of Willowbrook. (Par. 3) Mrs. Olech brought the lawsuit under 42 U.S.C. §1983 to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution. (Par. 1)

According to the Amended Complaint, on August 8, 1989, Mrs. Olech and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Willowbrook and other defendants in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 ("the state court lawsuit"), in which the plaintiffs sought money damages from Willowbrook and the other defendants as a result of the flooding of the plaintiffs' property by stormwater. (Par. 7) Howard Brinkman's claims in the state court were dismissed for want of prosecution on April 1, 1991. (Par. 8) The Olechs' claim against Willowbrook in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Mrs. Olech, individually and as special administrator of the estate of Thaddeus Olech, and against Willowbrook in the amount of $20,000.00, and judgment was entered on the verdict. (Par. 9) The claim of Rodney C. Zimmer and Phyllis S. Zimmer against Willowbrook in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of the Zimmers and against Willowbrook in the amount of $135,000.00, and judgment was

entered on that verdict. (Par. 10) Grace Olech is Phyllis Zimmer's mother. (Par. 3)

According to the Amended Complaint, the state court lawsuit against Willowbrook, which was ultimately determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Willowbrook, and generated substantial ill will toward the plaintiffs in the state court lawsuit on the part of Willowbrook and its officers and employees, including Modaff and Pretzer. (Par. 11) The Amended Complaint alleged that said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Willowbrook and its officers and employees look bad, from the erroneous belief on the part of Willowbrook's officers and employees that the state court lawsuit was frivolous and meritless, and from the fact that, prior to the filing of the state court lawsuit, Grace and Thaddeus Olech and Howard Brinkman had refused to grant certain drainage easements for a storm water drainage project favored by Willowbrook. (Par. 12)

From a long time prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on November 24, 1996, Grace Olech and Thaddeus Olech were the joint owners of and resided in a single family home at 6440 Tennessee Avenue in Willowbrook, Illinois, on the west side of Tennessee Avenue. (Par. 13) Since the death of Thaddeus, Grace Olech has been the sole owner of this property ("the Olech property") and has continued to reside there. (Par. 14) In the spring of 1995 the private well on the Olech property, which provided potable water for the Olech home, broke down and was beyond repair. (Par. 15) The Olechs then im-

plemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney and Phyllis Zimmer, via an overground hose. (Par. 16) At that time Willowbrook's water main on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of the Olechs on Tennessee Avenue. (Par. 17)

By the spring of 1995 Willowbrook had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to Willowbrook's municipal water system, to hook up to the system. (Par. 18) There is nothing in the record to suggest that this plan contemplated dedication of Tennessee Avenue to Willowbrook or its paving or the installation of sidewalks.

On May 23, 1995, while the state court lawsuit was pending, Grace Olech and Thaddeus Olech, along with Howard Brinkman, and Rodney and Phyllis Zimmer, made a request to Willowbrook that their homes be hooked up right away to Willowbrook's municipal water supply system. At or about that time Modaff was informed that the well on the Olech property had broken down, and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing. (Par. 19) As required by law, Willowbrook undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each of the three parcels of property involved of one-third of the estimated cost of the project. (Par.

20) On July 11, 1995, Grace and Thaddeus Olech paid to Willowbrook $7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Willowbrook had received the required payments from Howard Brinkman and the Zimmers. (Par. 21)

According to the Amended Complaint, the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the Zimmer property is not, and never has been a dedicated public street, and no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue adjacent to the Brinkman, Olech, or Zimmer properties. (Par. 22)

In August of 1995 Modaff told Phyllis Zimmer that Willowbrook would not proceed with the project unless all of the property owners involved granted Willowbrook a 33-foot easement along Tennessee Avenue, and in that same month Pretzer told Phyllis Zimmer that the 33-foot easement would be required for the project. (Par. 23-24) On September 21, 1995, Modaff sent to Grace and Thaddeus Olech and to the other property owners involved a Plat of Easement whereby they and the property owners on the other side of Tennessee Avenue would each dedicate to Willowbrook a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant to Willowbrook a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street. (Par. 25)

According to the Amended Complaint, the defendants' demands for 33-foot easements and a 66-foot dedicated

street as a condition of the extension of the water main were not consistent with the policy of Willowbrook regarding other property in Willowbrook. The Village Attorney, Gerald M. Gorski, eventually admitted as much in a letter dated November 10, 1995, in which he stated as follows:

> [A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."
>
> (Par. 26)

The Amended Complaint alleges that the Petitioners treated Grace and Thaddeus Olech, Howard Brinkman, and Rodney and Phyllis Zimmer differently from other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit *and in an attempt to control stormwater drainage in the vicinity to the detriment of the Olechs and the other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue.* (Par. 27) The Amended Complaint alleges that the Petitioners' decision to treat the Olechs and the other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main was irrational and wholly arbitrary, and was made by the appropriate policy-making official or employee of Willowbrook. (Par. 28)

According to the Amended Complaint, because the 33-foot easements and the 66-foot dedicated street demanded by the Petitioners were not consistent with what the Petitioners required in relation to other property in the Village of Willowbrook, Grace and Thaddeus Olech and the other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication. (Par. 29) And from the time that Modaff first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project. (Par. 30)

On November 10, 1995, Willowbrook relented and withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Willowbrook were granted a 15-foot easement for the water main and for related water service lines used to connect the homes. (Par. 31) The easement demanded by Willowbrook in its attorney's letter of November 10, 1995, was consistent with what was required by Willowbrook in relation to other property in Willowbrook, and, therefore, Grace and Thaddeus Olech, and the other property owners involved agreed to grant that easement. (Par. 32)

The Amended Complaint alleged that the initial refusal of the Petitioners to proceed with the project unless Willowbrook was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather. (Par. 33) In November of 1995 the overground hose used by Grace and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Grace and

Thaddeus Olech were without running water from November of 1995 until the project was completed on March 19, 1996. (Par. 34) The Amended Complaint alleges that "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress." (Par. 35) The Amended Complaint alleges that the initial refusal of the Petitioners to proceed with the project unless Willowbrook was granted the 33-foot easements and 66-foot street dedication "and the concomitant and resulting delay in the project" deprived Grace Olech of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the Petitioners in that regard were undertaken either with the intent to deprive Grace Olech and others of those rights, or in reckless disregard of those rights. (Par. 36) Finally, the Amended Complaint alleged that the actions and inactions of the Petitioners set forth therein were undertaken under color of state law. (Par. 37) Grace Olech sought compensatory and punitive damages as well as an award of her reasonable attorney's fees under 42 U.S.C. §1988.

The Petitioners filed a Motion To Dismiss Plaintiff's Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6). (Doc. 9) Following briefing of the motion to dismiss, the district court granted the motion and dismissed the

action. (Docs. 20, 21, 22) Grace Olech filed a timely Notice Of Appeal (Doc. 23), and, following briefing and argument, the Court of Appeals for the Seventh Circuit reversed. *Olech v. Village of Willowbrook*, 160 F.3d 386 (7th Cir. 1998).

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR A WRIT OF *CERTIORARI* SHOULD BE DENIED BECAUSE THE PETITIONERS DID NOT PROPERLY RAISE BELOW THE CONTENTION THAT THEY SEEK TO RAISE HERE, AND BECAUSE THE COURT OF APPEALS IN THIS CASE PROPERLY FOLLOWED PRECEDENT HOLDING THAT A PERSON'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE ARE VIOLATED WHEN HE IS TREATED BY THE GOVERNMENT AND ITS OFFICIALS DIFFERENTLY FROM OTHERS SIMILARLY SITUATED AS A RESULT OF A TOTALLY ILLEGITIMATE ANIMUS AGAINST HIM.

In the district court, in response to Mrs. Olech's Amended Complaint, the Petitioners filed a Motion To Dismiss Plaintiff's Amended Complaint (Doc. 9) along with a Memorandum Of Law In Support Of Motion To Dismiss. (Doc. 10) In their memorandum, the Petitioners did not argue that an equal protection claim could not be brought by a "class of one" where the plaintiff does not allege membership in a vulnerable group. In fact, in their memorandum, the Petitioners referred to the type of equal protection claim approved in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), as "what has been colloquially known as 'Category Three' discrimination." (Doc. 10, p. 6) The defendants stated that "'Category Three' discrimination requires fats [sic]

which establish 'an orchestrated campaign of official harassment' directed at the individual 'out of sheer malice.'" (Doc. 10, p. 7) The defendants argued that Mrs. Olech's Amended Complaint lacked sufficient allegations of malice to state a claim for "Category Three" discrimination (Doc. 10, pp. 7-8), and that the allegations of the Amended Complaint showed that Mrs. Olech was not treated differently from other property owners. (Doc. 10, pp. 8-9) The Petitioners did not argue that the Equal Protection Clause does not protect people from "Category Three" discrimination, or that *Esmail v. Macrane,* 53 F.3d 176 (7th Cir. 1995), had been incorrectly decided.

Mrs. Olech filed a response to the motion to dismiss (Doc. 18), and the Petitioners filed a reply. (Doc. 19) The Petitioners' reply had the following three argument headings: (1) "Plaintiff's Amended Complaint Fails to Sufficiently Allege Malicious Conduct" (Doc. 19, p. 1), (2) "Defendant's Conduct Was Not the Cause of Plaintiff's Injury" (Doc. 19, p. 4), and (3) "The Plaintiff Has Not Sufficiently Alleged Others Similarly Situated Were Treated Differently" (Doc. 19, p. 6). The defendants in a footnote implied that *Esmail* should be limited to cases involving the denial of licenses, and contended, citing *Sarantakis v. Village of Winthrop Harbor,* 969 F.Supp. 1095 (N.D. Ill. 1997), that equal protection claims based on the denial of government services, as opposed to the denial of government licenses, should be based on discrimination directed at groups, rather than individuals (Doc. 19, p. 2), but that footnote was not referred to by the district court, perhaps because it was simply a footnote to the Petitioners' argument that the amended complaint failed to sufficiently allege malicious conduct, or perhaps based on the rule that ar-

guments in support of a motion to dismiss not raised in the district court until the reply are deemed waived. (*Lockery v. Leavitt Tube Employees' Profit Sharing Plan*, 748 F.Supp. 662, 667 (N.D. Ill. 1990).) In this regard, it should also be noted that a party cannot raise an issue on appeal unless it is raised in a meaningful way below. *Bates v. Baltimore & Ohio R.R. Co.*, 9 F.3d 29 (7th Cir. 1993).

The Petitioners' brief in the Court of Appeals for the Seventh Circuit contained the following argument headings: (1) "Plaintiff's First Amended Complaint Fails to State a Cause of Action Under Principles Set Forth in the Case of *Esmail v. Macrane*," (2) "Plaintiff Has Not Alleged That Similarly-Situated Individuals Were Treated Differently," and (3) "Defendants' Conduct Was Not the Cause of Plaintiff's Injury." (Defendant's brief, p. 3) The closest that the defendants came to raising the issue that an equal protection claim cannot be brought on behalf of a "class of one" where the plaintiff does not allege membership in a vulnerable group was when they elaborated as follows on the contention in the footnote from their reply that *Esmail* should not be applied to cases involving the denial of government services as opposed to the denial of government licenses:

> *Sarantakis* is also noteworthy because it, like the instant case, involved the denial of government services, as opposed to the refusal of a business license at issue in *Esmail*. *Sarantakis* holds that where the claim involves the denial of government services, the equal protection claim must be based upon discrimination directed at groups, rather than individuals. 969 F.Supp. at 1105. It is submitted by Defendants

> that *Sarantakis*, rather than *Esmail*, controls this case and Plaintiff's alleged 'classification of one' does not state a claim for equal protection. Indeed, the *Esmail* doctrine has not been accepted at all in the Fourth or Sixth Circuits. *Edwards v. City of Goldsboro*, (E.D.N.C. 1997) 981 F.Supp. 406, 410; *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996); and *Dubuc v. Green Oak Township*, 958 F.Supp. 1231, 1236-37 (E.D. Mich. 1997)."
>
> (Defendant's Brief, p. 15.)

The defendants did not urge the Court of Appeals for the Seventh Circuit to overrule its decision in *Esmail*, nor did the defendants argue in the Court of Appeals, as they are attempting to argue here, that no equal protection claim can be based on a "class of one," or that the equal protection clause protects people only insofar as they are members of vulnerable groups.

Because the defendants did not properly raise below the issue that they are seeking to raise in their petition for a writ of *certiorari*, nor did the defendants urge the Court of Appeals to overrule its decision in *Esmail*, which they are now contending improperly recognized equal protection claims based on a "class of one," the petition for a writ of *certiorari* should be denied. (See *United States v. Ortiz*, 422 U.S. 891, 898, 95 S.Ct. 2585, 45 L.Ed.2d 623.) It should also be noted in this regard that this case was decided on the pleadings, and that the evidentiary facts have not been developed either through summary judgment proceedings or trial.

Moreover, even if the defendants had properly raised below the issue that they are seeking to raise in their petition for a writ of *certiorari*, this Court should decline to grant the writ because the Court of Appeals for

the Seventh Circuit in this case properly followed precedent holding that the equal protection clause is violated when the government treats a person differently from others similarly situated as a result of a "totally illegitimate animus toward" the person. (160 F.3d 386, 388.) This equal protection analysis has been approved by many courts. As stated in *Indiana State Teachers Association v. Board of School Commissioners*, 101 F.3d 1179, 1181 (7th Cir. 1996):

> "This court has upheld an equal-protection claim in two 'class of one' cases, in which a governmental body treated individuals differently who were identically situated in all respects rationally related to the government's mission. In *Esmail v. Macrane*, supra, a liquor dealer was denied the renewal of his license solely because of the mayor's spite. In *Ciechon v. City of Chicago*, 686 F.2d 511, 522-24 (7th Cir. 1982), two paramedics were identically responsible for the death of a patient, yet only one was disciplined and the city was mysteriously unable to give a reason (such as a desire to economize on enforcement resources or even to randomize enforcement, as in the ancient military practice of decimation) for the difference in treatment. There are similar cases in other circuits. *Rubinovitz v. Rogato*, 60 F.3d 906, 911-12 (1st Cir. 1995); *Yerardi's Moody St. Restaurant & Lounge, Inc. v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981); *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980); *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946) (L. Hand, J.); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1083 (5th Cir. 1989) (dissenting opinion). While the prin-

> cipal target of the equal protection clause is discrimination against members of vulnerable groups, the clause protects class-of-one plaintiffs victimized by 'the wholly arbitrary act.' *City of New Orleans v. Dukes*, 427 U.S. 297, 304, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976) (per curiam)."

Finally, it should be noted that the Petitioners argue that "[t]he lack of harmony between the *Esmail* doctrine and the decisions cited herein leave public officials . . . uncertain as to their rights . . . when making . . . these decisions." (Petition, p. 13.) Essentially, the Petitioners are saying that government officials need guidance from this Court as to whether it is constitutional for them to treat certain of the governed differently from others as a result of a "totally illegitimate animus." (*Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998).) It is respectfully suggested that such guidance should not be needed.

II.

THE PETITION FOR A WRIT OF *CERTIORARI* SHOULD BE DENIED IN THAT THE OPINION OF THE COURT OF APPEALS DOES NOT REPRESENT AN EXPANSION OF PRECEDENT BECAUSE, CONTRARY TO THE ARGUMENTS MADE BY THE PETITIONERS, AN EQUAL PROTECTION CLAIM DOES NOT HAVE TO BE BASED ON AN "ORCHESTRATED CAMPAIGN OF OFFICIAL HARASSMENT," AND THE ALLEGATIONS OF THE AMENDED COMPLAINT IN THIS CASE SHOW THAT THE PETITIONERS' ACTIONS WERE NOT MOTIVATED BY A LEGITIMATE STATE OBJECTIVE.

The Defendants argue that "the opinion below authorizes an unwarranted expansion of a very narrow cause

of action for equal protection on behalf of a 'class of one'" because the opinion recognizes an equal protection claim in the absence of an orchestrated campaign of official harassment, and because the Petitioners' actions set forth in the Amended Complaint were related to a legitimate state objective. Both of these arguments are without merit. The Equal Protection Clause provides, in relevant part, "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const. Amend. XIV, § 1.) There is nothing in the text or history of the amendment which would indicate, as the Petitioners have argued, that the clause can only be violated by an "orchestrated campaign of official harassment." As used by the defendants, the word "campaign" appears to connote an extended series of events.

In *Esmail* the Court of Appeals held that unequal treatment motivated by vindictive animosity violates the equal protection clause. (53 F.2d 176, 179.) Although the case of *Esmail* involved an orchestrated campaign of official harassment, the Court of Appeals in that case did not hold that a plaintiff could not allege an equal protection violation unless he could show such a campaign. What the Court required was that the plaintiff plead "unequal treatment" resulting from "animosity," vindictiveness, or bad faith on the part of the government officials involved. (53 F.3d 176, 179.) Significantly, in *Esmail* the Court cited *Ziegler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981), as a case applying its holding, and in *Ziegler* there was no allegation of an orchestrated campaign of official harassment. The allegation in *Ziegler* was simply that the plaintiff's rights under the equal protection clause were vio-

lated when a state agency refused to let him become a policeman because of certain prior convictions he had where the agency "had waived the character requirement for other individuals convicted of similar or more serious crimes." (638 F.2d 778-779.) Moreover, the Court in *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989), another case cited by the Court in *Esmail* as a case applying its holding, stated the principle as follows:

> "[L]iability in the instant type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious *or bad faith intent to injure a person.*" (Emphasis added.)

The Court in *Yerardi*'s did not require a showing of "an orchestrated campaign of official harassment." Unequal treatment undertaken maliciously or in bad faith to injure a person is enough. Finally, the case of *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), cited by the Court in *Esmail* as a basis for its holding, did not involve an orchestrated campaign of official harassment. It involved action by the City of Chicago in terminating the employment of a paramedic based on an incident which received substantial press coverage where another paramedic who was equally responsible in the incident was not punished. What these cases require is that the plaintiff plead unequal treatment resulting from vindictiveness, animosity, or other improper purpose of the government officials involved, and

Mrs. Olech has alleged that in this case. Contrary to the Petitioners' contention, the opinion of the Court of Appeals in this case does not represent "an unwarranted expansion of a very narrow cause of action for equal protection on behalf of a "class of one." (Petition, p. 14)

Moreover, contrary to the argument of the Petitioners, the facts of the Amended Complaint, which must be taken as true at this stage of the proceedings (see *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)), state what the Petitioners' objective or motivation was for their conduct, and that was not a legitimate state objective. The Amended Complaint states that the Petitioners treated Mrs. Olech differently from other property owners in the village by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main "because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue." (Par. 27) It is not a legitimate state objective for the government to increase flooding on a person's private property out of spite or in order to retaliate against him for filing a lawsuit relating to stormwater management. It is not a legitimate state objective to take property, such as easement rights or rights to street dedication, from an owner without paying for such property (U.S. Const. Amend. V), nor, as a result of ill will, to demand such property rights from a property owner as a condition of receiving running water, when the government does not

demand such property rights of others as a condition of receiving running water. Nor is it a legitimate government objective to attempt to extort, by threat of withholding running water, property rights from a homeowner who has had the temerity to sue the government for flooding his property. The Petitioners' argument that the actions on their part were related to a legitimate state objective is simply an attempt to contradict the allegations of the Amended Complaint which, as noted above, is inappropriate at this stage of the proceedings. The Petitioners' arguments that they lacked malice and an intent to harass, and that Mrs. Olech was a random victim of governmental error are similar attempts by the Petitioners to contradict the allegations of the Amended Complaint, which cannot be done at this stage of the proceedings. In light of the allegations of the Amended Complaint, which must be accepted as true at this stage of the proceedings, it is absurd for the Petitioners to argue, as they do, that they were trying to "benefit" the Respondent and her neighbors, Mr. Brinkman and the Zimmers. (Petition, p. 16)

Finally the defendants have argued that the opinion of the Court of Appeals "will trigger innumerable lawsuits against municipalities and public officials brought by citizens claiming they were treated differently by a governmental entity motivated by ill will." (Defendants' petition, p. 19) In the first place, it is unlikely that the opinion of the Court of Appeals will have the effect that the defendants suggest because it does not represent a departure from long-standing precedent cited in Argument I hereof. (See, *e.g., Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946) (L. Hand, J.).) Yet, even if it were likely to cause an increase in the number of

claims being brought, it would be a strange doctrine of constitution exegesis that would interpret the meaning of the language of the constitution in order to minimize the number of claims that could be brought. It would surprise the founding fathers, indeed, if a guiding principle in interpreting the constitution was to interpret the rights of the citizenry in as niggardly a fashion as possible.

CONCLUSION

For the reasons stated herein, the Respondent, Grace Olech, respectfully requests that this Honorable Court deny the Petition for a Writ of *Certiorari*.

Respectfully submitted,

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LAW OFFICES OF
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Counsel of Record
for Respondent

APPENDIX

App. 1

[Dated October 8, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH,	)	
	)	
Plaintiff,	)	
-vs-	)	No. 97 C 4935
	)	
VILLAGE OF WILLOWBROOK,	)	Judge Marovich
an Illinois municipal corporation,	)	
GARY PRETZER, individually	)	Magistrate
and President of Defendant	)	Judge Keys
VILLAGE OF WILLOWBROOK,	)	
and PHILIP J. MODAFF,	)	Plaintiff Demands
individually and as Director of	)	Trial By Jury
Public Services of Defendant	)	
VILLAGE OF WILLOWBROOK,	)	
	)	
Defendants.	)	

AMENDED COMPLAINT

(42 U.S.C. § 1983)

NOW COMES Plaintiff GRACE OLECH, by and through her attorney, JOHN R. WIMMER, and complaining of the Defendants, VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, alleges and states as follows:

1. That Plaintiff GRACE OLECH has brought this action to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution.

2. That jurisdiction over this action has been conferred upon this Court under 28 U.S.C. § 1331 and § 1334, and 42 U.S.C. § 1983.

3. That Plaintiff GRACE OLECH is, and at all times hereinmentioned was, a citizen of the United States and a resident of Willowbrook, DuPage County, Illinois, and Plaintiff GRACE OLECH is the mother of Phyllis S. Zimmer who is mentioned hereinafter.

4. That Defendant VILLAGE OF WILLOWBROOK is, and at all times hereinmentioned was, a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois.

5. That Defendant GARY PRETZER is an individual who is President of Defendant VILLAGE OF WILLOWBROOK and was President of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

6. That Defendant PHILIP J. MODAFF is an individual who was Director of Public Services of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

7. That on August 8, 1989, Plaintiff GRACE OLECH and her since deceased husband, Thaddeus Olech, along

with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Defendant VILLAGE OF WILLOWBROOK and others in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 (hereinafter "the state court lawsuit"), in which the plaintiffs sought money damages from Defendant VILLAGE OF WILLOWBROOK and others as a result of the flooding of the plaintiffs' property, including what is hereinafter referred to as the Olech property, by stormwater.

8. That Howard Brinkman's claims in the state court case were dismissed for want of prosecution on April 1, 1991.

9. That the claim of Plaintiff GRACE OLECH and Thaddeus Olech against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Plaintiff GRACE OLECH, individually and as special administrator of the estate of Thaddeus Olech, and against Defendant VILLAGE OF WILLOWBROOK in the amount of $20,000.00, and judgment was entered on that verdict.

10. That the claim of Rodney C. Zimmer and Phyllis S. Zimmer against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Rodney C. Zimmer and Phyllis S. Zimmer and against Defendant VILLAGE OF WILLOWBROOK in the amount of $135,000.00, and judgment was entered on that verdict.

11. That the state court lawsuit against Defendant VILLAGE OF WILLOWBROOK, which was ultimately

determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Defendant VILLAGE OF WILLOWBROOK, and generated substantial ill will on the part of Defendant VILLAGE OF WILLOWBROOK and its officers and employees, including PHILIP J. MODAFF and, on information and belief, Defendant GARY PRETZER toward the plaintiffs in the state court lawsuit.

12. That, on information and belief, said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Defendant VILLAGE OF WILLOWBROOK and its officers and employees look bad; the erroneous belief on the part of officers and employees of Defendant VILLAGE OF WILLOWBROOK that the state court lawsuit was frivolous and meritless; and the fact that, prior to the filing of the state court lawsuit, Plaintiff GRACE OLECH and Thaddeus Olech, and Howard Brinkman had refused to grant certain drainage easements for a stormwater drainage project favored by Defendant VILLAGE OF WILLOWBROOK.

13. That, from a time long prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on or about November 24, 1996, Plaintiff GRACE OLECH and Thaddeus Olech resided in a single-family home on, and were the joint owners of, certain property commonly known as 6440 Tennessee Avenue, Willowbrook, Illinois 60514 (hereinafter referred to as "the Olech property") and legally described as follows:

> "The East half of the North half of the South half of the Southwest quarter of the Northeast quarter of the Northeast quarter of Section 22,

> Township 38 North, Range 11, East of the Third Principal Meridian in DuPage County, Illinois."

14. That, since the death of Thaddeus Olech, Plaintiff GRACE OLECH has been the sole owner of the Olech property and has continued to reside thereon.

15. That in the spring of 1995 the private well on the Olech property, which had theretofore provided potable water for the Olech home, broke down and was beyond repair.

16. That Plaintiff GRACE OLECH and Thaddeus Olech then and there implemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney C. Zimmer and Phyllis S. Zimmer, via an overground hose.

17. That at that time the water main of Defendant VILLAGE OF WILLOWBROOK on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of Plaintiff GRACE OLECH and Thaddeus Olech.

18. That by the spring of 1995 Defendant VILLAGE OF WILLOWBROOK had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on Tennessee Avenue who were not hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK to hook up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

19. That on or about May 23, 1995, and while the state court lawsuit was pending, Plaintiff GRACE

OLECH and Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, made a request to Defendant VILLAGE OF WILLOWBROOK that their homes be hooked up right away to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK, and at or about that time Defendant PHILIP J. MODAFF was informed that the well on the Olech property had broken down and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing.

20. That, as required by law, Defendant VILLAGE OF WILLOWBROOK undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each parcel of property involved of one-third of the estimated cost of the project.

21. That on or about July 11, 1995, Plaintiff GRACE OLECH and Thaddeus Olech paid to Defendant VILLAGE OF WILLOWBROOK $7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Defendant VILLAGE OF WILLOWBROOK had received the required payments from Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer.

22. That the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property of Rodney C. Zimmer and Phyllis S. Zimmer is not, and never has been, a dedicated public street, and, on information and belief, no easements had been granted to any governmental body

for the use of any portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property owned by Rodney C. Zimmer and Phyllis S. Zimmer.

23. That in August of 1995 Defendant PHILIP J. MODAFF told Phyllis S. Zimmer that Defendant VILLAGE OF WILLOWBROOK would not proceed with the project unless all of the property owners involved granted Defendant VILLAGE OF WILLOWBROOK a 33-foot easement along Tennessee Avenue.

24. That in August of 1995 Defendant GARY PRETZER told Phyllis Zimmer that the 33-foot easement would be required for the project.

25. That on or about September 21, 1995, Defendant PHILIP J. MODAFF sent to Plaintiff GRACE OLECH and Thaddeus Olech and to other property owners involved a Plat of Easement whereby they and property owners on the other side of Tennessee Avenue would each dedicate a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street.

26. That the demands of the Defendants for 33-foot easements and a 66-foot dedicated public street as a condition of the extension of the water main were not consistent with the policy of Defendant VILLAGE OF WILLOWBROOK regarding other property in the Village of Willowbrook; as was ultimately admitted by the Village Attorney, Gerald M. Gorski, in a letter dated November 10, 1995, "[A] fifteen foot (15') easement,

along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

27. That the Defendants treated Plaintiff GRACE OLECH and Thaddeus Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue.

28. That the decision by the Defendants to treat Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot street dedication as a condition for the extension of the water main was irrational and wholly arbitrary, and, on information and belief, was made by the appropriate policy-making official or employee of Defendant VILLAGE OF WILLOWBROOK.

29. That, because the 33-foot easements and the 66-foot dedicated street demanded by the Defendants were not consistent with what the Defendants required in relation to other property in the Village of Willowbrook, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication.

30. That from the time that Defendant PHILIP J. MODAFF first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project.

31. That on or about November 10, 1995, Defendant VILLAGE OF WILLOWBROOK withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Defendant VILLAGE OF WILLOWBROOK were granted a 15-foot easement for the water main and for the related water service lines used to connect to the homes.

32. That the easement demanded by Defendant VILLAGE OF WILLOWBROOK in its attorney's letter of November 10, 1995, was consistent with what was required by Defendant VILLAGE OF WILLOWBROOK in relation to other property in the Village of Willowbrook, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved, agreed to grant said easement.

33. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather.

34. That in November of 1995 the overground hose used by Plaintiff GRACE OLECH and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech were without running water from November of 1995 until the project was completed on or about March 19, 1996.

35. That as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress.

36. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and 66-foot street dedication and the concomitant and resulting delay in the project deprived Plaintiff GRACE OLECH of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the Defendants in that regard were undertaken either with the intent to deprive Plaintiff GRACE OLECH and others of said rights, or in reckless disregard of said rights.

37. That the actions and inactions of the Defendants set forth above were undertaken under color of state law.

WHEREFORE, Plaintiff GRACE OLECH prays that this Court:

(a) Award Plaintiff GRACE OLECH compensatory damages in an amount to be determined by the trier of fact;

(b) Award Plaintiff GRACE OLECH punitive damages in an amount to be determined by the trier of fact;

(c) Award Plaintiff GRACE OLECH her reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988; and

(d) Grant Plaintiff GRACE OLECH such other and further relief as is proper and just in the premises.

GRACE OLECH

By: /s/ John R. Wimmer
Attorney for the Plaintiff

JOHN R. WIMMER
Attorney at Law
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Downers Grove, Illinois 60515
(630) 810-0005
Attorney No. 03125600

No. 98-1288

In The

Supreme Court of the United States

VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of the VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of the VILLAGE OF WILLOWBROOK,

Petitioners,

v.

GRACE OLECH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed February 9, 1999
Certiorari Granted September 28, 1999

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Relevant Docket Entries

VILLAGE OF WILLOWBROOK, et. al. v. GRACE OLECH
No. 98-1288

Date	Proceedings
	United States District Court, N.D. Illinois Case No. 97 C 4935
7/11/97	Complaint, including jury demand, filed.
9/3/97	Motion to Dismiss for Failure to State a Cause of Action filed.
9/3/97	Memorandum of Law in Support of Motion to Dismiss filed.
9/10/97	Order entered giving Plaintiff to October 8, 1997, to file an Amended Complaint.
10/8/97	Amended Complaint, including jury demand, filed.
10/28/97	Motion to Dismiss Plaintiff's Amended Complaint filed.
10/28/97	Memorandum of Law in Support of Motion to Dismiss filed.
11/21/97	Motion by Defendants for leave to substitute as attorney of record filed.
11/26/97	Order entered granting leave to substitute as attorney of record. James DeAno and Christy Benton granted leave to file appearance as counsel of record for Defendants.
12/19/97	Plaintiff's Response to Defendants' Motion to Dismiss the Amended Complaint filed.
1/9/98	Reply filed.

4/13/98 Memorandum Opinion and Order granting Defendants' Motion to Dismiss.

4/13/98 Minute Order entered granting Defendants' Motion to Dismiss.

4/13/98 Judgment in a Civil Case issued dismissing action in its entirety.

5/13/98 Notice of Appeal by Grace Olech filed.

United States Court of Appeals for the
Seventh Circuit
Case No. 98-2235

7/29/98 Brief of Plaintiff-Appellant Grace Olech filed.

8/27/98 Brief of the Defendants-Appellees filed.

9/11/98 Reply Brief of Plaintiff-Appellant Grace Olech filed.

10/8/98 Oral argument.

11/12/98 Opinion reversing Judgment and Order granting Defendants' Motion to Dismiss.

Supreme Court of the United States
October Term, 1998
Case No. 98-1288

2/9/99 Petition for a Writ of Certiorari filed.

5/26/99 Respondent's Brief in Opposition to the Petition for a Writ of Certiorari filed.

9/28/99 Order granting Petition for a Writ of Certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH, Plaintiff, -vs- VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, Defendants.	)	No. 97 C 4935 Judge Marovich Magistrate Judge Keys Plaintiff Demands Trial By Jury

AMENDED COMPLAINT

(42 U.S.C. § 1983)

(Received Oct. 08, 1997)

NOW COMES Plaintiff GRACE OLECH, by and through her attorney, JOHN R. WIMMER, and complaining of the Defendants, VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, alleges and states as follows:

1. That Plaintiff GRACE OLECH has brought this action to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution.

2. That jurisdiction over this action has been conferred upon this Court under 28 U.S.C. § 1331 and § 1334, and 42 U.S.C. § 1983.

3. That Plaintiff GRACE OLECH is, and at all times hereinmentioned was, a citizen of the United States and a resident of Willowbrook, DuPage County, Illinois, and Plaintiff GRACE OLECH is the mother of Phyllis S. Zimmer who is mentioned hereinafter.

4. That Defendant VILLAGE OF WILLOWBROOK is, and at all times hereinmentioned was, a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois.

5. That Defendant GARY PRETZER is an individual who is President of Defendant VILLAGE OF WILLOWBROOK and was President of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

6. That Defendant PHILIP J. MODAFF is an individual who was Director of Public Services of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

7. That on August 8, 1989, Plaintiff GRACE OLECH and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Defendant VILLAGE OF WILLOWBROOK and others in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 (hereinafter "the state court lawsuit"), in which the plaintiffs sought money damages from Defendant VILLAGE OF WILLOWBROOK and others as a result of the flooding of the plaintiffs' property, including what is hereinafter referred to as the Olech property, by stormwater.

8. That Howard Brinkman's claims in the state court case were dismissed for want of prosecution on April 1, 1991.

9. That the claim of Plaintiff GRACE OLECH and Thaddeus Olech against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Plaintiff GRACE OLECH, individually and as special administrator of the estate of Thaddeus Olech, and against Defendant VILLAGE OF WILLOWBROOK in the amount of $20,000.00, and judgment was entered on that verdict.

10. That the claim of Rodney C. Zimmer and Phyllis S. Zimmer against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Rodney C. Zimmer and Phyllis S. Zimmer and against Defendant VILLAGE OF WILLOWBROOK in the amount of $135,000.00, and judgment was entered on that verdict.

11. That the state court lawsuit against Defendant VILLAGE OF WILLOWBROOK, which was ultimately determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Defendant VILLAGE OF WILLOWBROOK, and generated substantial ill will on the part of Defendant VILLAGE OF WILLOWBROOK and its officers and employees, including PHILIP J. MODAFF and, on information and belief, Defendant GARY PRETZER toward the plaintiffs in the state court lawsuit.

12. That, on information and belief, said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Defendant VILLAGE OF WILLOWBROOK and its officers and employees look bad; the erroneous belief on the part of officers and employees of Defendant VILLAGE OF WILLOWBROOK that the state court lawsuit was frivolous and meritless; and the fact that, prior to the filing of the state court lawsuit, Plaintiff GRACE OLECH and Thaddeus Olech, and Howard Brinkman had refused to grant certain drainage easements for a stormwater drainage project favored by Defendant VILLAGE OF WILLOWBROOK.

13. That, from a time long prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on or about November 24, 1996, Plaintiff GRACE OLECH and Thaddeus Olech resided in a single-family home on, and were the joint owners of, certain property commonly known as 6440 Tennessee Avenue, Willowbrook, Illinois 60514 (hereinafter referred to as "the Olech property") and legally described as follows:

"The East half of the North half of the South half of the Southwest quarter of the Northeast quarter of the Northeast quarter of Section 22, Township 38 North, Range 11, East of the Third Principal Meridian in DuPage County, Illinois."

14. That, since the death of Thaddeus Olech, Plaintiff GRACE OLECH has been the sole owner of the Olech property and has continued to reside thereon.

15. That in the spring of 1995 the private well on the Olech property, which had theretofore provided potable water for the Olech home, broke down and was beyond repair.

16. That Plaintiff GRACE OLECH and Thaddeus Olech then and there implemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney C. Zimmer and Phyllis S. Zimmer, via an overground hose.

17. That at that time the water main of Defendant VILLAGE OF WILLOWBROOK on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of Plaintiff GRACE OLECH and Thaddeus Olech.

18. That by the spring of 1995 Defendant VILLAGE OF WILLOWBROOK had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on Tennessee Avenue who were not hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK to hook up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

19. That on or about May 23, 1995, and while the state court lawsuit was pending, Plaintiff GRACE OLECH and Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, made a request to Defendant VILLAGE OF WILLOWBROOK that their homes be hooked up right away to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK, and at or about that time Defendant PHILIP J. MODAFF was informed that the well on the Olech property had broken down and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing.

20. That, as required by law, Defendant VILLAGE OF WILLOWBROOK undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each parcel of property involved of one-third of the estimated cost of the project.

21. That on or about July 11, 1995, Plaintiff GRACE OLECH and Thaddeus Olech paid to Defendant VILLAGE OF WILLOWBROOK $7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Defendant VILLAGE OF WILLOWBROOK had received the required payments from Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer.

22. That the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property of Rodney C. Zimmer and Phyllis S. Zimmer is not, and never has been, a dedicated

public street, and, on information and belief, no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property owned by Rodney C. Zimmer and Phyllis S. Zimmer.

23. That in August of 1995 Defendant PHILIP J. MODAFF told Phyllis S. Zimmer that Defendant VILLAGE OF WILLOWBROOK would not proceed with the project unless all of the property owners involved granted Defendant VILLAGE OF WILLOWBROOK a 33-foot easement along Tennessee Avenue.

24. That in August of 1995 Defendant GARY PRETZER told Phyllis Zimmer that the 33-foot easement would be required for the project.

25. That on or about September 21, 1995, Defendant PHILIP J. MODAFF sent to Plaintiff GRACE OLECH and Thaddeus Olech and to other property owners involved a Plat of Easement whereby they and property owners on the other side of Tennessee Avenue would each dedicate a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street.

26. That the demands of the Defendants for 33-foot easements and a 66-foot dedicated public street as a condition of the extension of the water main were not consistent with the policy of Defendant VILLAGE OF WILLOWBROOK regarding other property in the Village

of Willowbrook; as was ultimately admitted by the Village Attorney, Gerald M. Gorski, in a letter dated November 10, 1995, "[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

27. That the Defendants treated Plaintiff GRACE OLECH and Thaddeus Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue.

28. That the decision by the Defendants to treat Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot street dedication as a condition for the extension of the water main was irrational and wholly arbitrary, and, on information and belief, was made by the appropriate policy-making official or employee of Defendant VILLAGE OF WILLOWBROOK.

29. That, because the 33-foot easements and the 66-foot dedicated street demanded by the Defendants were

not consistent with what the Defendants required in relation to other property in the Village of Willowbrook, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication.

30. That from the time that Defendant PHILIP J. MODAFF first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project.

31. That on or about November 10, 1995, Defendant VILLAGE OF WILLOWBROOK withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Defendant VILLAGE OF WILLOWBROOK were granted a 15-foot easement for the water main and for the related water service lines used to connect to the homes.

32. That the easement demanded by Defendant VILLAGE OF WILLOWBROOK in its attorney's letter of November 10, 1995, was consistent with what was required by Defendant VILLAGE OF WILLOWBROOK in relation to other property in the Village of Willowbrook, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved, agreed to grant said easement.

33. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather.

34. That in November of 1995 the overground hose used by Plaintiff GRACE OLECH and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech were without running water from November of 1995 until the project was completed on or about March 19, 1996.

35. That as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress.

36. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and 66-foot street dedication and the concomitant and resulting delay in the project deprived Plaintiff GRACE OLECH of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the Defendants in that regard were undertaken either with the intent to deprive Plaintiff GRACE OLECH and others of said rights, or in reckless disregard of said rights.

37. That the actions and inactions of the Defendants set forth above were undertaken under color of state law.

WHEREFORE, Plaintiff GRACE OLECH prays that this Court:

(a) Award Plaintiff GRACE OLECH compensatory damages in an amount to be determined by the trier of fact;

(b) Award Plaintiff GRACE OLECH punitive damages in an amount to be determined by the trier of fact;

(c) Award Plaintiff GRACE OLECH her reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988; and

(d) Grant Plaintiff GRACE OLECH such other and further relief as is proper and just in the premises.

GRACE OLECH

By: /s/ John R. Wimmer
Attorney for the Plaintiff

JOHN R. WIMMER
Attorney at Law
928 Warren Avenue
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(630) 810-0005
Attorney No. 03125600

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH, *Plaintiff,*	)	**NO. 97 C 4935**
vs.	)	**Judge Marovich**
VILLAGE OF WILLOWBROOK, an Illinois Municipal Corporation, GARY PRETZER, Individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, Individually and as Director of Public Services for Defendant VILLAGE OF WILLOWBROOK, *Defendants.*	)	

MOTION TO DISMISS
PLAINTIFF'S AMENDED COMPLAINT

(Received Oct. 28, 1997)

NOW COME the Defendants, the Village of Willowbrook, Gary Pretzer and Philip J. Modaff, by their attorneys, Robert C. Yelton III and Jeffrey Edward Kehl of Dowd & Dowd, Ltd., and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, move this court to dismiss the Plaintiff's Complaint for failure to state a cause of action upon which relief may be granted. For this Motion, the Defendants would show this court as follows:

1. On October 8, 1997, the Plaintiff caused her one count Amended Complaint to be filed against the Village

of Willowbrook and two of its employees, Gary Pretzer and Philip J. Modaff. (A copy of the Plaintiff's Amended Complaint is attached hereto and incorporated herein as Exhibit A).

2. The Plaintiff seeks relief under 42 U.S.C. §1983 for what the Plaintiff alleges to be a violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Plaintiff's Amended Complaint, ¶1).

3. As more specifically submitted in the Defendants' Memorandum of Law in Support of Motion to Dismiss filed contemporaneously herewith, the Defendants contend that the Plaintiff has failed to state a cause of action upon which relief may be granted because she has not alleged discrimination based upon her exercise of constitutional rights.

WHEREFORE, the Defendants respectfully request this court to enter an order dismissing the Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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Jeffrey Edward Kehl
DOWD & DOWD, LTD.
55 West Wacker Drive,
Suite 1000
Chicago, Illinois 60601
(312) 704-4400
Counsel for the Defendants

Dowd & Dowd, Ltd.

/s/ Jeffrey Edward Kehl
Jeffrey Edward Kehl
One of the Attorneys
for the Defendants

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH,	)	No. 97 C 4935
Plaintiff,	)	Judge Marovich
-vs-	)	Magistrate Judge Keys
VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK,	)	Plaintiff Demands Trial By Jury
Defendants.	)	

AMENDED COMPLAINT

(42 U.S.C. § 1983)

NOW COMES Plaintiff GRACE OLECH, by and through her attorney, JOHN R. WIMMER, and complaining of the Defendants, VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF

WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, alleges and states as follows:

1. That Plaintiff GRACE OLECH has brought this action to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution.

2. That jurisdiction over this action has been conferred upon this Court under 28 U.S.C. § 1331 and § 1334, and 42 U.S.C. § 1983.

3. That Plaintiff GRACE OLECH is, and at all times hereinmentioned was, a citizen of the United States and a resident of Willowbrook, DuPage County, Illinois, and Plaintiff GRACE OLECH is the mother of Phyllis S. Zimmer who is mentioned hereinafter.

4. That Defendant VILLAGE OF WILLOWBROOK is, and at all times hereinmentioned was, a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois.

5. That Defendant GARY PRETZER is an individual who is President of Defendant VILLAGE OF WILLOWBROOK and was President of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

6. That Defendant PHILIP J. MODAFF is an individual who was Director of Public Services of Defendant

VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

7. That on August 8, 1989, Plaintiff GRACE OLECH and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Defendant VILLAGE OF WILLOWBROOK and others in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 (hereinafter "the state court lawsuit"), in which the plaintiffs sought money damages from Defendant VILLAGE OF WILLOWBROOK and others as a result of the flooding of the plaintiffs' property, including what is hereinafter referred to as the Olech property, by stormwater.

8. That Howard Brinkman's claims in the state court case were dismissed for want of prosecution on April 1, 1991.

9. That the claim of Plaintiff GRACE OLECH and Thaddeus Olech against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Plaintiff GRACE OLECH, individually and as special administrator of the estate of Thaddeus Olech, and against Defendant VILLAGE OF WILLOWBROOK in the amount of $20,000.00, and judgment was entered on that verdict.

10. That the claim of Rodney C. Zimmer and Phyllis S. Zimmer against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury

which, on February 11, 1997, returned a verdict in favor of Rodney C. Zimmer and Phyllis S. Zimmer and against Defendant VILLAGE OF WILLOWBROOK in the amount of $135,000.00, and judgment was entered on that verdict.

11. That the state court lawsuit against Defendant VILLAGE OF WILLOWBROOK, which was ultimately determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Defendant VILLAGE OF WILLOWBROOK, and generated substantial ill will on the part of Defendant VILLAGE OF WILLOWBROOK and its officers and employees, including PHILIP J. MODAFF and, on information and belief, Defendant GARY PRETZER toward the plaintiffs in the state court lawsuit.

12. That, on information and belief, said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Defendant VILLAGE OF WILLOWBROOK and its officers and employees look bad; the erroneous belief on the part of officers and employees of Defendant VILLAGE OF WILLOWBROOK that the state court lawsuit was frivolous and meritless; and the fact that, prior to the filing of the state court lawsuit, Plaintiff GRACE OLECH and Thaddeus Olech, and Howard Brinkman had refused to grant certain drainage easements for a stormwater drainage project favored by Defendant VILLAGE OF WILLOWBROOK.

13. That, from a time long prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on or about November 24, 1996, Plaintiff GRACE OLECH and Thaddeus Olech resided in a single-family home on,

and were the joint owners of, certain property commonly known as 6440 Tennessee Avenue, Willowbrook, Illinois 60514 (hereinafter referred to as "the Olech property") and legally described as follows:

> "The East half of the North half of the South half of the Southwest quarter of the Northeast quarter of the Northeast quarter of Section 22, Township 38 North, Range 11, East of the Third Principal Meridian in DuPage County, Illinois."

14. That, since the death of Thaddeus Olech, Plaintiff GRACE OLECH has been the sole owner of the Olech property and has continued to reside thereon.

15. That in the spring of 1995 the private well on the Olech property, which had theretofore provided potable water for the Olech home, broke down and was beyond repair.

16. That Plaintiff GRACE OLECH and Thaddeus Olech then and there implemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney C. Zimmer and Phyllis S. Zimmer, via an overground hose.

17. That at that time the water main of Defendant VILLAGE OF WILLOWBROOK on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of Plaintiff GRACE OLECH and Thaddeus Olech.

18. That by the spring of 1995 Defendant VILLAGE OF WILLOWBROOK had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on

Tennessee Avenue who were not hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK to hook up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

19. That on or about May 23, 1995, and while the state court lawsuit was pending, Plaintiff GRACE OLECH and Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, made a request to Defendant VILLAGE OF WILLOWBROOK that their homes be hooked up right away to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK, and at or about that time Defendant PHILIP J. MODAFF was informed that the well on the Olech property had broken down and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing.

20. That, as required by law, Defendant VILLAGE OF WILLOWBROOK undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each parcel of property involved of one-third of the estimated cost of the project.

21. That on or about July 11, 1995, Plaintiff GRACE OLECH and Thaddeus Olech paid to Defendant VILLAGE OF WILLOWBROOK $7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Defendant VILLAGE OF WILLOWBROOK had received the required payments from Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer.

22. That the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property of Rodney C. Zimmer and Phyllis S. Zimmer is not, and never has been, a dedicated public street, and, on information and belief, no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property owned by Rodney C. Zimmer and Phyllis S. Zimmer.

23. That in August of 1995 Defendant PHILIP J. MODAFF told Phyllis S. Zimmer that Defendant VILLAGE OF WILLOWBROOK would not proceed with the project unless all of the property owners involved granted Defendant VILLAGE OF WILLOWBROOK a 33-foot easement along Tennessee Avenue.

24. That in August of 1995 Defendant GARY PRETZER told Phyllis Zimmer that the 33-foot easement would be required for the project.

25. That on or about September 21, 1995, Defendant PHILIP J. MODAFF sent to Plaintiff GRACE OLECH and Thaddeus Olech and to other property owners involved a Plat of Easement whereby they and property owners on the other side of Tennessee Avenue would each dedicate a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street.

26. That the demands of the Defendants for 33-foot easements and a 66-foot dedicated public street as a

condition of the extension of the water main were not consistent with the policy of Defendant VILLAGE OF WILLOWBROOK regarding other property in the Village of Willowbrook; as was ultimately admitted by the Village Attorney, Gerald M. Gorski, in a letter dated November 10, 1995, "[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

27. That the Defendants treated Plaintiff GRACE OLECH and Thaddeus Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue.

28. That the decision by the Defendants to treat Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot street dedication as a condition for the extension of the water main was irrational and wholly arbitrary, and, on information and belief, was made by the appropriate policy-making official or employee of Defendant VILLAGE OF WILLOWBROOK.

29. That, because the 33-foot easements and the 66-foot dedicated street demanded by the Defendants were not consistent with what the Defendants required in relation to other property in the Village of Willowbrook, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication.

30. That from the time that Defendant PHILIP J. MODAFF first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project.

31. That on or about November 10, 1995, Defendant VILLAGE OF WILLOWBROOK withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Defendant VILLAGE OF WILLOWBROOK were granted a 15-foot easement for the water main and for the related water service lines used to connect to the homes.

32. That the easement demanded by Defendant VILLAGE OF WILLOWBROOK in its attorney's letter of November 10, 1995, was consistent with what was required by Defendant VILLAGE OF WILLOWBROOK in relation to other property in the Village of Willowbrook, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved, agreed to grant said easement.

33. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project

of approximately three months, a delay which proved critical as a result of the approaching winter weather.

34. That in November of 1995 the overground hose used by Plaintiff GRACE OLECH and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech were without running water from November of 1995 until the project was completed on or about March 19, 1996.

35. That as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress.

36. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and 66-foot street dedication and the concomitant and resulting delay in the project deprived Plaintiff GRACE OLECH of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the Defendants in that regard were undertaken either with the intent to deprive Plaintiff GRACE OLECH and others of said rights, or in reckless disregard of said rights.

37. That the actions and inactions of the Defendants set forth above were undertaken under color of state law.

WHEREFORE, Plaintiff GRACE OLECH prays that this Court:

(a) Award Plaintiff GRACE OLECH compensatory damages in an amount to be determined by the trier of fact;

(b) Award Plaintiff GRACE OLECH punitive damages in an amount to be determined by the trier of fact;

(c) Award Plaintiff GRACE OLECH her reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988; and

(d) Grant Plaintiff GRACE OLECH such other and further relief as is proper and just in the premises.

GRACE OLECH

By: /s/ John R. Wimmer
Attorney for the Plaintiff

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IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH, *Plaintiff,* vs. VILLAGE OF WILLOWBROOK, an Illinois Municipal Corporation, GARY PRETZER, Individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, Individually and as Director of Public Services for Defendant VILLAGE OF WILLOWBROOK, *Defendants.*	**NO. 97 C 4935** **Judge Marovich**

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

(Received Oct. 28, 1997)

NOW COME the Defendants, the Village of Willowbrook, Gary Pretzer, and Philip J. Modaff, by their attorneys, Robert C. Yelton III and Jeffrey Edward Kehl of Dowd & Dowd, Ltd., and submit the following matters for the court's consideration in ruling on the Defendants' Motion to Dismiss the Plaintiff's Amended Complaint.

Preface

The Plaintiff's Amended Complaint seeks relief under 42 U.S.C. §1983 for what the Plaintiff perceives to be a violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Defendants have filed a Motion to Dismiss because the Amended Complaint fails to state a cause of action upon which relief may be granted. As will be demonstrated below, the facts alleged by the Plaintiff do not support the conclusion that the Defendants violated her right to equal protection under the laws of this State. As such, no remedy is available to the Plaintiff under 42 U.S.C. §1983.

Standard of Review

In considering a Motion to Dismiss, this court is obligated to view all factual allegations in the light most favorable to the Plaintiff. A motion to dismiss will not be granted unless it appears from the complaint that the Plaintiff can prove no set of facts to support her claims that would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 954 (7th Cir. 1989). To this end, all well-pleaded facts are taken as true. *City of Milwaukee v. Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976).

This does not mean, however, that extensive factual allegations or even a factual dispute will immunize a complaint from dismissal under Rule 12(b)(6). Rather, even with all facts being accepted by the court, the Plaintiff must still present a cause of action as a matter of law.

Mitchell v. Archibald & Kendall, Inc., 573 F.2d 429, 433 (7th Cir. 1978).

More importantly, this court is not "to ignore any facts set forth in the complaint that undermine the plaintiff's claim or to assign any weight to unsupported conclusions of law." *D'City National Bank v. Checker, Simon & Rosner*, 32 F.3d 277, 281 (7th Cir. 1994) (*quoting Dimming v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993).

Factual Background

The Amended Complaint alleges that prior to the Spring of 1995, the Village of Willowbrook developed a plan under which all houses along Tennessee Avenue in Willowbrook were to be hooked up to the Village's water system. The plan was to be implemented within two years of the Spring of 1995. (Amended Complaint, ¶ 18). As part of this two-year plan, homeowners could be connected to the Village water system only if they paid one-third of the total cost for the connection. (Amended Complaint, ¶ 20). In addition, homeowners on both sides of Tennessee Avenue would be required to grant a 33 foot easement to the Village. (Amended Complaint, ¶ 25).

According to the Plaintiff, in the Spring of 1995, the private well servicing her residence at 6440 Tennessee Avenue in Willowbrook, Illinois broke down. (Amended Complaint, ¶ 17). In order to have water available in her house, the Plaintiff had a garden hose run from her neighbor's house to hers. (Amended Complaint, ¶ 16).

On May 23, 1995, the Plaintiff and her adjoining neighbors, the Zimmers and the Brinkmans, made a written request to the Village to have their residences connected to the Village's water system "right away." (Amended Complaint, ¶ 19). Nearly two months later, on July 11, 1995, the Plaintiff paid the Village her share of the cost for the proposed connection under the two-year plan. (Amended Complaint, ¶ 21). The Plaintiff's adjoining neighbors, the Brinkmans and the Zimmers paid shortly thereafter. (Amended Complaint, ¶ 21). The Plaintiff makes no mention of when the homeowners on the other side of Tennessee Avenue paid their shares, if ever.

The Plaintiff claims that notice of the proposed 33 foot easement was not given to her neighbor until August 1995. (Amended Complaint, ¶¶ 23-24). Written notice was sent to the Plaintiff in September of that year. (Amended Complaint, ¶ 25). In any event, the Plaintiff alleges that the demand for a 33 foot easement was not acceptable to her. As such, she and some of the other property owners refused to grant the Village the requested easement. (Amended Complaint, ¶ 29).

Subsequently, on November 10, 1995, the Village sent a letter to the Plaintiff which apparently indicated that a street dedication was not necessary to complete the job but that a temporary construction easement and a permanent easement of fifteen feet would be required. According to the Amended Complaint, a letter from the Village Attorney indicated that a 15 foot easement would be consistent with Village policy regarding all other property in the Village. (Amended Complaint, ¶ 26).

The Plaintiff alleges that because the fifteen foot easement was consistent with requirements for other properties in the Village, she and other property owners agreed to grant the required easement. The Plaintiff does not allege that all affected property owners granted the easement, or if so, when. (Amended Complaint, ¶ 32).

In November, 1995 the hose running from to [sic] the Plaintiff's house broke, leaving her with no running water until the two-year project was completed on March 19, 1996. (Amended Complaint, ¶ 34). The Plaintiff does not explain why a new hose was not implemented, why she never had her well fixed, or how the lack of running water in late 1995 differed from her predicament in the Spring of 1995.

In any event, the Plaintiff claims that "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless [the Village] was granted the 33-foot easement and the 66-foot street dedication, [the Plaintiff was] without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress." (Amended Complaint, ¶ 35).

For her action, the Plaintiff maintains that the initial refusal to proceed without a 33 foot easement and the three-month delay before a 15-foot easement was required deprived her of her rights under the Equal Protection Clause of the Fourteenth Amendment. (Amended Complaint, ¶ 36). Specifically, the Plaintiff claims that the refusal to proceed without a 33-foot easement was prompted by "ill will" on the part of the Defendants

because the Plaintiff, the Zimmers, and Howard Brinkman had filed a lawsuit against the Village. (Amended Complaint, ¶¶ 11-12). However, as the Plaintiff concedes, the action brought by Mr. Brinkman had been dismissed in 1991, and the Plaintiff's own action, viewed as frivolous by the Village in 1995, did not result in a judgment in favor of the Plaintiff until 1997. (Amended Complaint, ¶¶ 7-10).

The Plaintiff does not explain how the alleged "ill will" harbored by the Village toward the Plaintiff, Zimmers, and Mr. Brinkman manifested itself other than by the requirement that the homeowners grant a 33-foot easement. The fact that the 33-foot easement was also required of property owners on the other side of Tennessee Avenue, (Amended Complaint, ¶ 25) who had not sued the Village and for whom there are no allegations of "ill will" is, as discussed below, most destructive to the Plaintiff's claim.

Argument

The Plaintiff Fails to Allege a Cause of Action under §1983 for any Violation of her Rights Under the Equal Protection Clause of the Fourteenth Amendment.

The Plaintiff seeks to impose §1983 liability on the Defendants under what has been colloquially known as "Category Three" discrimination. Within the general rubric of equal protection law, a plaintiff must show disparate treatment based on membership in a vulnerable group, racial or otherwise, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41, 105 S.Ct. 3249,

3254-55, 87 L.Ed.2d 313 (1985), or based upon the application of laws or policies which make irrational distinctions. *Lindsey v. Normet*, 405 U.S. 56, 74-79, 92 S.Ct. 862, 874-77, 31 L.Ed.2d 36 (1972). "Category Three" discrimination, however, occurs where "a powerful public official picked on a person out of sheer vindictiveness," and where there is "an orchestrated campaign of official harassment" directed at the individual "out of sheer malice." *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995).

The Plaintiff, by including many allegations regarding the state court action she and others brought against the Village, and by alleging that that lawsuit created "ill will" on the part of the Defendants, seeks to hawk this otherwise federally insignificant series of events as a matter of great constitutional import. The Defendants submit that this case has no business being in federal court for two reasons. First, the allegations do not sufficiently plead malice on the part of the Defendants. Second, the allegations of the Amended Complaint establish that the Plaintiff was treated no differently than homeowners against whom the Village harbored no "ill will."

1. The Amended Complaint Lacks Sufficient Allegations of Malice on the Part of the Defendants.

As indicated above, "Category Three" discrimination requires fats [sic] which establish "an orchestrated campaign of official harassment" directed at the individual "out of sheer malice." *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). All the Plaintiff can muster here is allegations that the Defendants harbored "ill will" against the Plaintiff because of her prior lawsuit. No facts are set

forth that show any "orchestrated campaign" or any ugly motive approaching "malice." Unless the Plaintiff can paint a more evil picture of the Defendants, her action should be dismissed for failure to state a cause of action upon which relief may be granted.

2. The Plaintiff Has Pled Herself Out of an Action By Alleging that Other Homeowners Were Asked to Grant a 33-Foot Easement.

The Plaintiff claims that her right to equal protection was violated by the Village because the Village wanted her to grant a 33-foot easement only because she had filed a state court action against the Village. This argument is defeated by the Plaintiff's own allegations.

The Plaintiff has alleged that the Village wanted all homeowners along *both sides* of Tennessee Avenue to grant a 33-foot easement. (Amended Complaint, ¶ 25). The Plaintiff, the Zimmers, and Mr. Brinkman all lived on one side of Tennessee Avenue. (Amended Complaint, ¶ 17). No one from the other side of Tennessee Avenue is alleged to have filed a state court action which caused "ill will" on the part of the Defendants.

Distilled to its finest essence, the Plaintiff's Amended Complaint states that the Plaintiff and her neighbors were all required to grant a 33-foot easement, regardless of whether they had filed a lawsuit against the Village. All homeowners along Tennessee Avenue were treated identically. As such, the Plaintiff could not possibly have been the victim of "sheer malice" or "vindictiveness" on the part of the Defendants.

The Equal Protection Clause cannot be construed as a means by which the Plaintiff may bring her whining before this court. Despite having filed a state court action against the Village, she was treated identically with those individuals who had not. In fact, the Amended Complaint shows that the two-year project was completed (as far as the Plaintiff was concerned) within a year. While the Plaintiff may have remained inconvenienced by her broken well and lack of potable water for longer than she wanted, this does not amount to a constitutional injury. As Judge Posner noted, "[t]he concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review by federal courts." *Indiana State Teachers Assn. v. Board of School Comm'rs of the City of Indianapolis*, 1010 F.3d 1179, 1181 (7th Cir. 1996).

Conclusion

For the foregoing reasons, the Defendants request this court to grant their Motion to Dismiss the Plaintiff's Amended Complaint.

Dowd & Dowd, Ltd.

/s/ Jeffrey Edward Kehl
Jeffrey Edward Kehl
One of the Attorneys for the Defendants

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Counsel for the Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH, Plaintiff, -vs- VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, Defendants.	)	No. 97 C 4935 Judge Marovich Magistrate Judge Keys

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

(Received Dec. 19, 1997)

NOW COMES the Plaintiff, GRACE OLECH, by and through her attorney, JOHN R. WIMMER, and submits this response to the Defendants' motion to dismiss the amended complaint.

STANDARD OF REVIEW

The Defendants' motion to dismiss the amended complaint has been brought under Fed.R.Civ.P. 12(b)(6). As stated in *Carl A. Haas Automobile Imports, Inc. v. Lola Cars Ltd.* (N.D.Ill. 1996), 933 F.Supp. 1381, 1384, "Familiar Rule 12(b)(6) principles require this Court to accept as

true the Complaint's well-pleaded factual allegations, together with all reasonable inferences in [plaintiff's] favor [citation omitted]"; and "[d]ismissal is appropriate only if it appears beyond doubt that [plaintiff] can prove no set of facts, consistent with the Complaint's allegations that would entitle it to relief [citation omitted]."

STATEMENT OF FACTS

According to the amended complaint, the Plaintiff, GRACE OLECH (hereinafter sometimes referred to as "Mrs. Olech"), is a resident of Willowbrook. (Par. 3) On August 8, 1989, Mrs. Olech and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Defendant VILLAGE OF WILLOWBROOK (hereinafter sometimes referred to as "Willowbrook") and others in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 (hereinafter sometimes referred to as "the state court lawsuit"), in which the plaintiffs sought money damages from Willowbrook and other defendants as a result of the flooding of the plaintiffs' property by stormwater. (Par. 7) Howard Brinkman's claims in the state court lawsuit were dismissed for want of prosecution on April 1, 1991. (Par. 8) The claim of Mrs. Olech and her husband against Willowbrook was tried to a jury which, on February 11, 1997, returned a verdict in favor of Mrs. Olech, individually and as special administrator for her husband, in the amount of $20,000.00, and judgment was entered on that verdict. (Par. 9) The claim of Rodney C. Zimmer and Phyllis S. Zimmer against Willowbrook was tried to the same jury which, on February

11, 1997, returned a verdict in favor of the Zimmers in the amount of $135,000.00, and judgment was entered on that verdict. (Par. 10) The state court lawsuit generated substantial ill will on the part of Willowbrook and its officers and agents including Defendants GARY PRETZER (hereinafter sometimes referred to as "Pretzer") and PHILIP J. MODAFF (hereinafter sometimes referred to as "Modaff") against the plaintiffs in that case. (Par. 11) The ill will resulted from the coverage of the state court lawsuit in the local press which made Willowbrook and its officers and employees look bad, from the erroneous belief that the state court lawsuit was frivolous, and from the fact that, prior to the filing of the state court lawsuit, Mrs. Olech and her husband, and Howard Brinkman had refused to grant certain easements for a stormwater drainage project favored by Willowbrook. (Par. 12)

In the spring of 1995 the private well on the Olech property on the west side of Tennessee Avenue broke down and *was beyond repair.* (Par. 15) Mrs. Olech and her husband implemented a temporary solution to the problem by hooking up to the well of their neighbor's to the south on Tennessee Avenue, the Zimmers, via an overground hose. (Par. 16) Mrs. Olech is Phyllis Zimmer's mother. (Par. 3)

At that time Willowbrook's water main extended as far south as the northern boundary of the property of Howard Brinkman, the Olech's neighbor to the north on Tennessee Avenue. (Par. 17) By the spring of 1995 Willowbrook had developed a plan (hereinafter sometimes referred to as "Willowbrook's 2-year plan") which was to be implemented within two years of the spring of 1995, and which was going to require all of the homeowners on

Tennessee Avenue who were not hooked up to Willowbrook's municipal water supply system to hook up to the system. (Par. 18) In Defendants' memorandum in support of their motion to dismiss, the Defendants' make the following false and misleading statements:

> "As part of this two-year plan, homeowners could be connected to the Village water system only if they paid one-third of the total cost for the connection. (Amended Complaint, [Par.] 20). In addition, homeowners on both sides of Tennessee Avenue would be required to grant a 33 foot easement to the Village.
>
> (Amended Complaint, [Par.] 25)."
>
> (Defendant's Memorandum, p. 3.)

Actually, those statements do not appear in the amended complaint. The work that was ultimately done by Willowbrook was not done pursuant to Willowbrook's two-year plan, but rather at the request of the Olechs, the Zimmers, and Mr. Brinkman for an extension of the water main "right away." (Par. 19) The amended complaint does not allege that the costs paid were assessed or that the easements were demanded pursuant to Willowbrook's 2-year plan.

On May 23, 1995, while the state court lawsuit was pending, the Olechs, the Zimmers, and Howard Brinkman made a request to Willowbrook that their homes be hooked up "right away" to the municipal water supply system. (Par. 19) At that time Modaff was informed that the well on the Olech property had broken down, and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, *a temporary*

solution which would not work in the winter when the temperature fell below freezing. (Par. 19) As required by law, Willowbrook undertook to extend the water main and hook up the homes as requested, conditioned on the payment by *each* of the homeowners, the Olechs, the Zimmers, and Mr. Brinkman, of one-third of the estimated total cost of the project. (Par. 20) On July 11, 1995, the Olechs paid Willowbrook $7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Willowbrook had received the required payments from the Zimmers and Mr. Brinkman. (Par. 21)

In the Defendants' memorandum in support of their motion to dismiss, the Defendants state that these moneys were paid "under the two-year plan," and that "[t]he Plaintiff makes no mention of when the homeowners on the other side of Tennessee Avenue paid their shares." (Defendants' Memorandum, p. 4.) The Defendants statements are again false and misleading. The money was not paid, nor was the work done "under the two-year plan." The work was undertaken at the request of the Olechs, the Zimmers, and Mr. Brinkman for connection "right away" to the municipal water system, and not as part of Willowbrook's two-year plan, and the amended complaint does not allege to the contrary. And the Plaintiff made no mention of when the homeowners on the other side of Tennessee Avenue paid their shares because *there are no homes on the other side of Tennessee Avenue*, and no property owner on the east side of Tennessee Avenue was assessed any money in connection with the work that Willowbrook actually did. The homes on the property located east of Tennessee Avenue and across from the property of the Olechs, the Zimmers, and

Mr. Brinkman are all the way over on Clarendon Hills Road, and those homes already had municipal water. Again, the amended complaint is not to the contrary.

The portion of Tennessee Avenue adjacent to the Brinkman, Olech, and Zimmer property was not a dedicated public street, and no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue. (Par. 22) In August 1995 Modaff told Zimmer that Willowbrook would not proceed with the requested water main extension unless all of the property owners involved granted Willowbrook a 33-foot easement along Tennessee Avenue, and Pretzer told Zimmer that a 33-foot easement would be required. (Pars. 22-23) On September 21, 1995, Modaff sent to the Olechs, the Zimmers, and Mr. Brinkman a Plat of Easement whereby they and the property owners on the other side of Tennessee Avenue would each dedicate a 33-foot strip of *their property* along Tennessee Avenue for public roadway purposes, which would result in a 66-foot wide dedicated public street. (Par. 25) These demands were not consistent with Willowbrook's policy regarding all other property in the village as was ultimately admitted on November 10, 1995, by the village attorney who stated that a 15-foot permanent easement would be sufficient and "consistent with Village policy regarding *all other property in the Village*." (Emphasis added.) (Par. 26) The Defendants chose to treat the Olechs, the Zimmers, and Mr. Brinkman differently from all other property owners in Willowbrook as a result of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of the Olechs and the other plaintiffs in the state court lawsuit by the

use of ditches and swales along Tennessee Avenue. (Par. 27) The decision by the Defendants to treat the Olechs and the other plaintiffs in the state court lawsuit in a manner not consistent with all other property owners in Willowbrook was irrational and wholly arbitrary. (Par. 28)

Because the 33-foot easements and the 66-foot dedicated street demanded by Willowbrook as a condition of extending its water main was not consistent with what the Defendants required in relation to all other property in the village, the Olechs and the other property owners involved refused to grant the 33-foot easements and 66-foot street dedication. (Par. 30) Finally, on November 10, 1995, Willowbrook withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Willowbrook were granted a 15-foot easement for the water main and the related water service lines used to connect to the homes. (Par. 31) Because the 15-foot easement requested by Willowbrook in its attorney's letter of November 10, 1995, was consistent with what was required by Willowbrook in relation to all other property in Willowbrook, the Olechs and the other property owners involved agreed to grant the 15-foot easement. (Par. 32)

The initial refusal of the Defendants to proceed with the requested water main extension unless Willowbrook were granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather. (Par. 33) In November 1995 the overground hose used by the Olechs to connect to the Zimmers well froze, and the Olechs were without

running water from November of 1995 until the project was completed on March 19, 1996. (Par. 34) *As a proximate result of the three-month delay* caused by Willowbrook's illegal and vindictive demands, Grace Olech, who was 72 years old, and Thaddeus Olech, who was 76 years old, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental distress. (Par. 35)

ARGUMENT

1. *The amended complaint adequately sets forth a violation of the equal protection clause.*

In *Esmail v. Macrane* (7th Cir. 1995), 53 F.3d 176, the plaintiff, Basim Esmail, a liquor dealer, alleged that Naperville officials had developed a deep-seated animosity toward him as a result of his success in getting Naperville's revocation of his retail liquor license reduced by the state liquor control commission to a suspension, as a result of Esmail's advertising campaign accusing Naperville officials of ineffectual enforcement of the law prohibiting the sale of alcohol to minors, and as a result of Esmail's withdrawal of financial and political support for the mayor. (53 F.3d 176, 178.) Esmail alleged that in 1992 Naperville denied two of his license applications based on trivial or trumped-up charges while Naperville routinely granted licenses to persons who had engaged in similar conduct. (53 F.3d 176, 178.) Esmail alleged that the denials of his license applications were for the purpose of exacting retaliation and vengeance. (53 F.3d 176, 178.) Esmail alleged that he was required to spend substantial attorney's fees to get his license applications finally

granted through the intervention of the state courts. (53 F.3d 176, 177.) The Seventh Circuit found that the complaint adequately pleaded a violation of the equal protection clause. In language pertinent to this case, the Court stated:

> "The distictive [sic] feature here, which the district judge did not discuss, is that the unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor.
>
> Our decision in *Ciechon v. City of Chicago,* 686 F.2d 511 (7th Cir. 1982), holds that such conduct, so motivated, violates the equal protection clause; and the holding, although it has rarely brought ultimate victory to a plaintiff, does not stand alone. *Vukadinovich v. Board of School Trustees,* 978 F.2d 403, 414 and n. 9 (7th Cir. 1992); *Chicago Cable Communications v. Chicago Cable Commission,* 879 F.2d 1540, 1547 (7th Cir. 1989); *Yerardi's Moody Street Restaurant v. Board of Selectmen,* 878 F.2d 16, 21 (1st Cir. 1989); *Zeigler v. Jackson,* 638 F.2d 776, 779 (5th Cir. 1981). . . . If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court."
>
> 53 F.3d 176, 179.

The Defendants' first argument is that in a claim under the equal protection clause pursuant to the principle discussed in *Esmail,* the plaintiff must plead "an orchestrated campaign of official harassment" directed at the individual "out of sheer malice." (Defendants' Memorandum, p. 7.) The Defendants argue that in this case the

amended complaint is insufficient because it does not set forth those elements.

The Defendants' argument is not well taken because *Esmail* does not require a plaintiff to plead an orchestrated campaign of official harassment or malice. What is required is that the plaintiff plead "unequal treatment" resulting from "animosity," vindictiveness, or bad faith on the part of the government officials involved. (53 F.3d 176, 179.) Significantly, the Court in *Esmail* cited *Ziegler v. Jackson* (5th Cir. 1981), 638 F.2d 776, 779, as a case applying its holding, and in *Ziegler* there was no allegation of an orchestrated campaign of official harassment. The allegation in *Ziegler* was simply that the plaintiff's rights under the equal protection clause were violated when a state agency refused to let him become a policeman because of certain prior convictions he had where the agency "had waived the character requirement for other individuals convicted of similar or more serious crimes." (638 F.2d 778-779.) Moreover, the Court in *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen* (1st Cir. 1989), 878 F.2d 16, 21, another case cited by the Court in *Esmail* as a case applying its holding, stated the principle as follows:

> "[L]iability in the instant type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, *intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.*" (Emphasis added.)
>
> (878 F.2d 16, 21.)

The Court in *Yerardi's* did not require a showing of "an orchestrated campaign of official harassment" or "sheer malice." Unequal treatment undertaken in bad faith is enough. Finally, the case of *Ciechon v. City of Chicago* (7th Cir. 1982), 686 F.2d 511, cited by the Court in *Esmail* as the basis for its holding, did not involve an orchestrated campaign of official harassment or "sheer malice." It involved action by the city in terminating the employment of a paramedic based on an incident which received substantial press coverage where another paramedic who was equally responsible in the incident was not punished. What *Esmail* requires is that the plaintiff show unequal treatment resulting from vindictiveness, animosity, or other improper purpose of the government officials involved.

Obviously, Mrs. Olech has pleaded those required elements. Olech has pleaded that, as a condition of Willowbrook extending its water main to service the Olechs, the Zimmers, and Mr. Brinkman, Willowbrook demanded that they grant Willowbrook a 33-foot easement, and that Willowbrook be granted a 66-foot street dedication. As Willowbrook's attorney ultimately admitted, this was not consistent with what Willowbrook required in relation to "all other property" in Willowbrook, *i.e.*, a simple 15-foot easement. Olech has also alleged that the Defendants chose to treat her differently for an improper purpose, *i.e.*, as a result of the ill will generated by the state court lawsuit against Willowbrook and in an attempt to control stormwater drainage in the vicinity to the detriment of the plaintiffs in the state court lawsuit by the use of ditches and swales along Tennessee Avenue. Mrs. Olech's complaint is sufficient.

2. *Mrs. Olech has not "pled herself out of an action" by alleging that Willowbrook demanded that property owners on the other side of Tennessee Avenue grant a 33-foot easement.*

The Defendants second argument is that the Plaintiff "pled herself out of an action" by alleging that other property owners were asked to grant a 33-foot easement. Willowbrook argues that the fact that it demanded a 33-foot easement from the owners of property on the east side of Tennessee Avenue shows that it was not acting out of ill will toward the plaintiffs in the state court action, the Olechs, the Zimmers, and Mr. Brinkman.

The Defendants argument is based on either a careless or a contrived reading of the amended complaint and a misstatement of the facts. There are no homes on the east side of Tennessee Avenue across from the Olechs, the Zimmers, and Mr. Brinkman, nor does the amended complaint allege that there are. The homes to the east of the Olechs, the Zimmers, and Mr. Brinkman are all the way over on Clarendon Hills Road, and in the spring of 1995, they already had municipal water. The amended complaint is not to the contrary. What the amended complaint alleges is that Willowbrook demanded the 33-foot easements and 66-foot street dedication as a condition of extending its water main at the request of the Olechs, the Zimmers, and Howard Brinkman, the plaintiffs in the state court lawsuit, that *their* homes be hooked up to the municipal water supply. (Par. 19) In effect, Willowbrook told the Olechs, the Zimmers, and Mr. Brinkman that they would not get municipal water unless and until they granted the 33-foot easements and obtained such easements from the property owners across the street who already had municipal water. Willowbrook's illegal

demands were directed at the plaintiffs in the state court lawsuit. Mrs. Olech has not "pled herself out of an action."

The Defendants' argument in this regard is similar to the argument that, when a black person and his white friend are denied admission to a public accommodation because of the black person's race, the black person cannot recover because his white friend was also excluded. That argument does not fly *(Valle v. Stengel* (3d Cir. 1949), 176 F.2d 697), nor does the Defendants' argument here have any merit. The amended complaint alleges that the Defendants' illegal demands were the result of ill will against the plaintiffs in the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of the plaintiffs in the state court lawsuit by the use of ditches and swales along Tennessee Avenue (par. 27), and that allegation must be accepted as true. The Defendants motion to dismiss is not well taken, and it should be denied.

Respectfully submitted,

/s/ John R. Wimmer
John R. Wimmer

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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH, Plaintiff, vs. VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant, VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services for Defendant, VILLAGE OF WILLOWBROOK, Defendants.	)	GEN. NO. 97 C 4935 Judge George M. Marovich Magistrate Judge Keys

REPLY

(Received Jan. 09, 1998)

NOW COMES the Defendants, the VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant, VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services for Defendant, VILLAGE OF WILLOWBROOK, by and through their attorneys, NORTON, MANCINI, ARGENTATI, WEILER & DeANO, and for their Reply to Plaintiff's Response to Defendants' Motion to Dismiss state as follows.

Plaintiff's Amended Complaint Fails to Sufficiently Allege Malicious Conduct

The standard for governmental conduct established by *Esmail* requires that the government orchestrate a campaign of official harassment aimed at doing significant harm to a harmless plaintiff. This cause of action is rooted in governmental conduct that is malicious, unrelenting, motivated by "malignant animosity," and "wholly unrelated to a legitimate public objective." *Esmail v. Macrane*, (7th Cir. 1995) 53 F.3d 176, 179-80; *Sarantakis v. Village of Winthrop Harbor*, (N.D.Ill. 1997) 969 F.Supp. 1095,[1] (plaintiff must demonstrate malice on the part of the governmental entity.) The necessary ingredients of the cause of action can be gleaned from the following statements in *Esmail:*

> In particular, Esmail is not complaining merely that equally or more guilty liquor licensees than he are treated more leniently. He is complaining about an orchestrated campaign of official harassment directed against him out of sheer malice. 53 F.3d 176 *at* 179.
>
> * * *
>
> If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant

[1] *Sarantakis* is more closely analogous to this case since it involves the denial of governmental services, whereas *Esmail* involved the refusal of a liquor license. Where the claim involves the denial of governmental services, according to *Sarantakis*, equal protection claims must be based on discrimination directed at groups, rather than individuals. 969 F.Supp. *at* 1105.

> animosity toward him, the individual ought to have a remedy in federal court. 53 F.3d *at* 179.
>
> * * *
>
> What it (the equal protection clause) does require, and what Esmail may or may not be able to prove, is that the action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective. 53 F.3d *at* 180.

The Plaintiff's Complaint does not allege the severity of conduct required by *Esmail*. The Village's lack of malice and intent to harass is evidenced by the fact that it abandoned its initial request within three months and agreed to a permanent easement of fifteen feet and a temporary easement of five feet. Thus, the initial thirty-three foot easement request could have been only the result of a legitimate attempt to improve Tennessee Avenue or a mistake, neither of which can amount to a denial of equal protection.

A claim for violation of equal protection will not lie where the governmental action was taken out of error, neglect or mistake. *Ciechon v. City of Chicago*, (7th Cir. 1982) 686 F.2d 511, 523; *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497. Although a plaintiff can be a member of a class of limited membership, the plaintiff must have been singled-out because of his membership in that class and not be just the random victim of governmental incompetence. *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992), aff'd 510 U.S.266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). At worst, Plaintiff's allegations show that the Plaintiff was a random victim of governmental

error; the Village initially asked the Plaintiff for a thirty-three-foot easement, but later obtained advice from counsel that a total of twenty feet of easement would suffice. (Plaintiff's Complaint *at* par. 26).

In *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, (7th Cir. 1996) 101 F.3d 1179, the court reasoned that even though a class can consist of a single member, the equal protection clause will apply in such circumstances only where the government seeks to "single out a hapless individual, firm or other entity for unfavorable treatment." 101 F. 3d *at* 1082. Even in such cases, however, the court noted that the plaintiff must still demonstrate defendant's conduct to be irrational and arbitrary.

In *Esmail*, the municipality "got" the plaintiff by depriving him of a liquor license thereby destroying his business. In *Ziegler v. Jackson*, (5th Cir. 1981) 638 F.2d 776, cited by *Esmail*, the governmental entity deprived the plaintiff of employment because of his convictions for presenting a fire arm and criminal provocation, while it retained other public employees convicted of similar offenses. The plaintiff therein could point to persons and circumstances identical to his own wherein the treatment was different.

Rather than demonstrating that Defendants attempted to "get" the Plaintiff, or that Defendants' conduct was irrational or arbitrary, Plaintiff's Complaint reveals that Defendants initially, and for a short time, sought an easement of sufficient width to improve the roadway with pavement, sidewalks and public utilities. Plaintiff, apparently not desirous of such improvements,

objected to the thirty-three foot easement, but ultimately agreed to a fifteen-foot easement, and another five-foot temporary construction easement. Defendants' conduct in this regard was hardly an orchestrated campaign of harassment, or an effort to "get" the Plaintiff, but merely a legitimate effort to improve a road obviously used by the Plaintiff with great frequency.

Defendants' Conduct Was Not the Cause of Plaintiff's Injury

In *Esmail*, the court found it significant that the plaintiff did not contribute to the cause of his predicament through his own conduct. The court characterized the plaintiff as a "harmless individual" whose treatment was "the result solely of a vindictive campaign by the mayor." 53 F.3d *at* 179. In *Indiana State Teachers Association*, the court followed this reasoning, noting that the plaintiff must be "hapless." 101 F.3d *at* 1082. In the context of this case, the Plaintiff cannot be said to be "harmless" or "hapless" with respect to her lack of water. It is not apparent from the Complaint that Plaintiff exhausted all reasonable attempts to repair her well or devise a new method of water delivery from her neighbor. In this sense, the Complaint fails to allege that Plaintiff's injury resulted "solely" from a vindictive campaign by Village officials. Plaintiff's deprivation of running water was merely incidental to the entire process and can hardly be deemed the objective of the Village. Plaintiff's Complaint even states that the plan to connect the homeowners on Tennessee Avenue to the municipal water supply system was developed in the spring of 1995 and was to be implemented within two years, or by the spring of 1997.

(Plaintiff's Complaint *at* par. 18). Yet, Plaintiff admits that she received water when the project was completed on or about March 19, 1996, a full year ahead of schedule. (Plaintiff's Complaint *at* par. 34).

There is no suggestion in Plaintiff's Complaint that the project was intended to be or could have been completed by November of 1995 when Plaintiff's hose froze. Plaintiff cites no law, custom, practice or precedent to suggest that the project should, would or could have provided public water service to the Plaintiff by November of 1995, even if the thirty-three foot easement had never been sought. Thus, irrespective of any attempts by the Village to acquire sufficient land to properly improve the road, Plaintiff cannot claim that her loss of water was due to the conduct of the Village.

Moreover, Plaintiff is still obligated to show that her injury would not have occurred but for Defendants' conduct. As the court noted in *Button v. Harden*, (7th Cir. 1987) 814 F.2d 382, 383:

> Section 1983 is a tort statute. To prevail under it, a plaintiff must show not only that his federal rights were violated but also that, had it not been for the violation, the injury of which he complains would not have occurred. *Citing Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471 (1977); *DeShaney v. Winnebago County Department of Social Services*, (7th Cir. 1987) 812 F.2d 298, 302.

The Plaintiff Has Not Sufficiently Alleged Others Similarly Situated Were Treated Differently

The Plaintiff has also failed to sufficiently allege that another person similarly situated to herself was treated differently. *O'Connor v. Chicago Transit Authority*, (7th Cir. 1993) 985 F.2d 1362; *Gaylor v. Thompson*, (W.D. Wis. 1996) 939 F.Supp. 1363, 1375. In *O'Connor*, an employee of the Chicago Transit Authority with a record of insubordination brought an equal protection claim asserting that his termination resulted from his whistle-blowing activity. Summary judgment for the defendant was affirmed, with the court noting that the plaintiff failed to demonstrate that another grossly insubordinate worker was treated differently than he.

In *Gaylor v. Thompson*, (W.D. Wis. 1996) 939 F.Supp. 1363, the plaintiffs applied for a display permit and alleged that they were denied equal protection because the governor directly engaged himself in the process, as he had done in no other case, and denied plaintiffs' application because of their views on the separation of church and state. Plaintiffs' failure to demonstrate how they were similarly situated to previous applicants or that they were the only ones treated differently than previous applicants resulted in dismissal of their claim.

The unique and extensive facts pled in Plaintiff's Complaint do not demonstrate a denial of equal protection. Plaintiff's residence adjacent to a non-dedicated road is a unique fact that contradicts the claim that others who sought connection to the public water supply were similarly situated. The Complaint alleges that Plaintiff requested a connection to the public water supply "right

away" after her well broke down. (Plaintiff's Amended Complaint *at* par. 19). The Plaintiff does not allege that any other residents who lived adjacent to such non-dedicated roads received public water "right away" after making a request or that the Village did not initially attempt to fully dedicate the road so that it could be improved with pavement, sidewalks and public utilities as part of the water connection project. The Complaint does not allege that the law required that Plaintiff's home be connected to the public water supply "right away" or that every other resident that ever made a request for public water service received that water "right away" or within three months or six months or nine months.

The Plaintiff alleges that Defendants' request for a thirty-three-foot easement was made in August and again in September, but that by November 10, 1995, the Village agreed that a fifteen-foot easement along with a five-foot temporary construction easement would suffice for the installation of the water main. The portion of the Village Attorney's letter cited in paragraph 26 of Plaintiff's Complaint is vague and does not suggest that Plaintiff was treated any differently than similarly situated residents. The letter states that the requirement of a fifteen-foot easement and a five-foot temporary construction easement was consistent with Village policy regarding "all **other** property" (emphasis added); this does not mean that other residents who lived adjacent to non-dedicated roads over which the governmental body had no easement were granted a water connection without a request for a thirty-three foot easement. Rather, the language cited by the Plaintiff is more reasonably construed to

mean that with respect to property "other" than Plaintiff's, i.e., where the residents seeking water were living adjacent to a fully improved road, fifteen-foot permanent and five-foot construction easements were sought by the Village.

Though Plaintiff attempts to draw the inference that her alleged unequal treatment was due to her status as a claimant against the Village in another lawsuit, that conclusion does not logically follow from the allegations of the Complaint. The Complaint pleads a rational, rather than arbitrary, basis for Defendants' conduct; the desire to improve a street used by the Plaintiff in conjunction with the installation of a water main under that street. As noted in *Albright v. Oliver,* (7th Cir. 1992) 975 F.2d 343, the state's act of singling out an individual for differential treatment does not itself create the class. It is the Plaintiff's membership in the class that must be the motivating force behind the government's act of singling her out for differential treatment. Absent allegations that the Village conditioned the delivery of public water to the Plaintiff on the Plaintiff's dismissal of her other claim against the Village, the Plaintiff has not properly alleged that her differential treatment resulted from her membership in a class of persons who have sued the Village.

Ciechon v. City of Chicago, (7th Cir. 1982) 686 F.2d 511, is distinguishable because the plaintiff therein could identify a similarly situated person who was treated differently by the defendant. The plaintiff was a female paramedic who was discharged by her employer because of her alleged failure to render proper treatment during an ambulance transport of a patient. The plaintiff's coworker, a male, was not disciplined, though he was

equally responsible for the treatment of the patient in question. Here, the Plaintiff has not identified a person similarly situated, i.e., someone who lost their water source from a private well and requested and received water from the municipal supply "right away."

In *Ziegler v. Jackson*, (5th Cir. 1981) 638 F.2d 776, cited by *Esmail*, the plaintiff, who was convicted of presenting a firearm and criminal provocation, was discharged from his position as a police officer pursuant to a statute which precluded the hiring as a police officer any person convicted of an offense involving the use of force or violence or moral turpitude. Because three other individuals convicted of assault and forgery were retained as police officers, the court concluded that the plaintiff had been deprived of equal protection.

In *Johnson v. City of Fort Wayne*, (7th Cir. 1996) 91 F.3d 922, 945, summary judgment was granted for the defendant on the equal protection claim because the plaintiff failed to allege or demonstrate, as he must, that any other police officer or firefighter in an upper-level policy-making position was given notice and a hearing before being demoted to the rank that individual held prior to being appointed to the policy-making position.

Conclusion

Plaintiff is asking this Court to scrutinize a decision to initially seek a thirty-three-foot easement for the improvement of a non-dedicated road as part of a project for the installation of a water main. Plaintiff's Complaint supplies facts which demonstrate that this request was neither arbitrary nor irrational, and also fails to allege

that similar requests for thirty-three-foot easements were not made when other residents requested the installation of a water main along a non-dedicated road. Moreover, the Plaintiff's loss of water was the result of her well breaking down and a hose freezing, not the result of governmental conduct. The extension of the principles which govern the *Esmail* decision to the facts set forth in Plaintiff's Complaint herein would trivialize the equal protection clause. *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, (7th Cir. 1996) 101 F.3d 1179, 1181 (the concept of equal protection is trivialized when it is used to subject every decision made by a local government to constitutional review by federal courts.)

WHEREFORE, in light of the foregoing, Defendants pray that this Court enter its Order dismissing the Plaintiff's Amended Complaint with prejudice.

Respectfully submitted,

NORTON, MANCINI,
ARGENTATI, WEILER
& DeANO

By: /s/ James L. DeAno
James L. DeAno

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH, Plaintiff, v. VILLAGE OF WILLOWBROOK, et al., Defendants.	)	No. 97 C 4935 Judge George M. Marovich

MEMORANDUM OPINION AND ORDER

Plaintiff Grace Olech ("Olech") filed this action, pursuant to 42 U.S.C. § 1983, against Defendants the Village of Willowbrook ("Willowbrook" or the "Village"), Gary Pretzer ("Pretzer"), individually and as President of Willowbrook, and Philip Modaff ("Modaff"), individually and as Director of Public Services for Willowbrook, alleging that Defendants violated her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants have filed a motion to dismiss Olech's Complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the Defendants' motion to dismiss is granted.

BACKGROUND

Olech is the 72-year-old owner and resident of a single-family home on Tennessee Avenue in Willowbrook,

Illinois.[1] Olech's home is located between two other homes on Tennessee Avenue – owned by Rodney and Phillis Zimmer (the "Zimmers") on the south and Howard Brinkman ("Brinkman") on the north.

Up until the spring of 1995, Olech and her late-husband obtained their potable water from a private well located on their property. In the spring of 1995, however, the Olechs' well broke down and was allegedly beyond repair. Because the Willowbrook water main extended only to the northern boundary of Brinkman's property – the Olechs' neighbor to the north on Tennessee Avenue – in order to obtain water, the Olechs were forced to hook an overground rubber hose up to the well of the Zimmers – their neighbors to the south on Tennessee Avenue.

The Olechs apparently viewed this as a "temporary solution" to their water problem. As such, the Olechs, the Zimmers and Brinkman allegedly asked Willowbrook to hook their homes up "right away" to the Willowbrook municipal water system. Olech contends that she explained her water problems (the broken well) to Modaff, the Director of Public Services for Willowbrook, and notified him that the overground hose would not work in the winter when the temperature fell below freezing.

Olech contends that after alerting Willowbrook to her problem, the Village began work on extending the water main to hook up Olech's home and the homes of her two neighbors. Willowbrook conditioned its work on an

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[1] Since the time that the events at issue in this suit took place Olech's husband, Thaddeus Olech, has died of causes unrelated to this action.

agreement by Olech and her neighbors to each pay one-third of the estimated cost of the project. By July 12, 1995, Willowbrook had received the required payments of $7,012.67 from Olech and her neighbors.

However, in August of 1995, Willowbrook informed Olech and her neighbors that in addition to their cash payments for the project, Willowbrook also required them to grant the Village a 33-foot easement along Tennessee Avenue. According to Olech, the Plat of Easement created by Willowbrook required property owners of both sides of Tennessee Avenue – the Olechs, Zimmers, and Brinkman live on the west side of Tennessee Avenue – to dedicate a 33-foot strip of property along Tennessee Avenue for public roadway purposes. Specifically, Willowbrook wanted to install a paved roadway with sidewalks and public utilities on Tennessee Avenue.

The Olechs and their neighbors refused to grant Willowbrook the 33-foot easement that it required. As a result of the property owners' refusal to grant the easement, no progress was made on the water project. Finally, on November 10, 1995, Willowbrook's attorney prepared a letter in which the Village withdrew its demand for a 33-foot easement and indicated to Olech and her neighbors that it would proceed with the water main extension if they would grant Willowbrook a 15-foot easement for the water main and the related water service line used to connect the homes. According to Olech's Complaint, the letter from Willowbrook's attorney stated, in part:

> [A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village.

(Compl. at ¶ 26.) Olech and her neighbors agreed to grant Willowbrook the 15-foot easement and the water project was completed approximately four months later on March 19, 1996.

Meanwhile, in November 1995, the overground hose used by the Olechs to connect to their neighbor's well froze. As a result, Olech and her husband were without running water from November 1995 through March 19, 1996.

Olech filed her Complaint with this Court alleging that Willowbrook violated her rights under the Equal Protection Clause by initially requiring that she and her neighbors grant the Village a 33-foot easement while only requiring a 15-foot easement from other Village residents.[2] Olech contends that the reason that she and her neighbors were singled out by Willowbrook was because they had each filed state-court lawsuits against the Village six years earlier in August of 1989.[3] Olech alleges that these lawsuits made Willowbrook and its officers and employees "look bad." Olech further alleges that these

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[2] Olech bases this allegation on the letter she received from Willowbrook's attorney reporting that a 15-foot easement was "consistent with Village policy regarding all other property in the Village."

[3] The Olechs, the Zimmers and Brinkman filed three state-court suits against Willowbrook for damage that resulted from the flooding of their property by storm water. The Olechs and Zimmers were successful in their suits against Willowbrook. Brinkman's claims were dismissed for want of prosecution.

lawsuits generated "substantial ill will" on the part of Willowbrook and its officers and employees. This "ill will," according to Olech, is what ultimately motivated Willowbrook to require a larger easement (33 feet) from her and her neighbors than what is normally required (15 feet) from other property owners in the Village. Olech maintains that the three-month delay, which resulted from Willowbrook's request for the larger easement, is what ultimately caused her and her husband to be without running water during the winter of 1995-1996. Thus, it is this three-month delay that Olech claims deprived her of her rights under the Equal Protection Clause.

DISCUSSION

I. Standards For a Motion to Dismiss

When considering a motion to dismiss, the Court examines the sufficiency of the complaint, not the merits of the lawsuit. *See Triad Assoc. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989). "[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence that supports the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A motion to dismiss will be granted only if the Court finds that the plaintiff can prove no set of facts that would entitle him to relief. *See Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 432 (7th Cir. 1993); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On a motion to dismiss, the Court draws all inferences and resolves all ambiguities in the plaintiffs's favor and assumes that all well-pleaded facts are true. *See Dimmig v. Wahl*, 983 F.2d 86, 86 (7th Cir. 1993).

II. Violation of the Equal Protection Clause

The Seventh Circuit has explained that there are two common varieties of equal protection claims: (1) those in which the plaintiff claims that she is a member of a vulnerable group (principally racial) and has been singled out for unequal treatment on that basis; and (2) those involving challenges to laws or rules that supposedly draw irrational distinctions. *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). A third and more unusual claim involves "orchestrated campaigns of official harassment directed against [a plaintiff] out of sheer malice." *Id.* at 179. Olech contends that her Complaint belongs to this highly unusual class of equal protection claims.

In *Esmail*, a Naperville liquor dealer (Esmail) alleged that he was denied the renewal of his liquor license as a result of an "orchestrated campaign" by the mayor. Specifically, Esmail alleged that the mayor, who is also Naperville's liquor control commissioner, not only denied his repeated applications for a liquor license, but also instituted a "campaign of vengeance" against him which consisted of causing the Naperville police to harass him and his employees with "constant, intrusive surveillance, in causing the police to stop his car repeatedly and forc[ing] him to undergo field sobriety tests, and in causing false criminal charges to be lodged against him." *Id.* at 178. The court summarized that Esmail's "charge here is that a powerful public official picked on a person out of sheer vindictiveness." *id.*

After reviewing Esmail's 22-page Complaint, the Seventh Circuit declared that:

> If the power of the government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court.

Id. at 179.

While this Court is sympathetic to alleged wrong suffered by Olech and her husband, the Court is not convinced that Olech's Complaint describes the "malignant animosity" or the "orchestrated campaign of official harassment" complained of in *Esmail*. Even accepting Olech's allegations that her state-court action generated "ill will" in Willowbrook against her and her neighbors, this Court is unable to conclude that the Village ever "harassed" or "picked on" Olech and her neighbors "out of sheer vindictiveness" as in *Esmail*. At most, Olech's Complaint alleges that the Village acted unreasonably and out of "ill will" in requiring her to give up an extra 18 feet of easement space that was not required of other property holders. This hardly qualifies as the same type of conduct alleged to have been suffered in *Esmail*. Moreover, based on the allegations contained in Olech's Complaint, it appears that the reason that the Village wanted 33 feet of easement rather than 15 feet of easement was so that it would be able to install a paved public roadway along Tennessee Avenue with sidewalks and public utilities – something it apparently could not do without the additional 18 feet of space. (Compl. at ¶ 25.) Nothing in Olech's Complaint – apart from conclusory assertions – indicates that Willowbrook was acting out of vindictiveness or in retaliation for Olech's prior lawsuit. *See Trask v. Rios*, 1995 WL 758410, at *5 (N.D. Ill. Dec. 19, 1995)

(" 'Harass,' 'discriminate,' and 'retaliate' are words to which legal significance attaches. Alone, they are legal conclusions that do not place defendants on notice of the circumstances from which the accusations arise and therefore are inappropriate pleading devices."); *Palda v. General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995) ("A complaint [that] consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)."). Assuming that all of the allegations contained in Olech's Complaint are true, it appears to this Court that there may be "ill will" on the part of both Willowbrook and Olech. Nevertheless, this Court finds that the alleged treatment of Olech by Willowbrook and its officers – as well as the alleged motivation behind this treatment – is not sufficient to state an equal-protection claim under the standards as set forth in *Esmail*.

CONCLUSION

For the foregoing reasons, this Court grants Defendants' motion to dismiss.

ENTER:

/s/ George M. Marovich
GEORGE M. MAROVICH
UNITED STATES
DISTRICT COURT

DATE: April 13, 1998

Minute Order Form (Rev. 12/90)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
GEORGE M. MAROVICH

Sitting Judge if Other Than Assigned Judge

Case Number 97 C 4935

Date April 13, 1998

Case Title
OLECH -v- VILLAGE OF WILLOWBROOK et al

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

DOCKET ENTRY:

(1) [ ] Filed motion of [use listing in "MOTION" box above].

(2) [ ] Brief in support of motion due _____

(3) [ ] Answer brief to motion due _____
Reply to answer brief due _____

(4) [ ] [ ] Ruling
on _____ set for _____
at _____
[ ] Hearing

(5) [ ] Status hearing
[ ] held [ ] continued to
[ ] set for [ ] re-set for
_____ at _____

(6) [ ] Pretrial conf.
[ ] held [ ] continued to
[ ] set for [ ] re-set for
_____ at _____

(7) [ ] Trial [ ] Set for [ ] re-set for
_____ at _____

(8) [ ] [ ] Bench Trial [ ] Jury Trial
[ ] Hearing
held and continued to _____ at _____

(9) [ ] This case is dismissed
[ ] without [ ] with
prejudice and without costs
[ ] by agreement [ ] pursuant to
[ ] FRCP 4(j) (failure to serve)
[ ] General Rule 21 (want of prosecution)
[ ] FRCP 41(a)(1)
[ ] FRCP 41(a)(2)

(10) [XX] [Other docket entry] Pursuant to Memorandum Opinion and Order entered this day, defendants' motion to dismiss is granted.

(11) [X] [For further detail see
[ ] order on the reverse of
[X] order attached to the original minute order form.]

[ ] No notices required, advised in open court.

[ ] No notices required.

[X] Notices mailed by judge's staff.

[ ] Notified counsel by telephone.

[ ] Docketing to mail notices.

[ ] Mail AO 450 form.

[ ] Copy to judge/magistrate Judge.

[X] courtroom
deputy's
Initials

Date/time received in central Clerk's Office

_____ number of notices

_____ date docketed

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13 April 98 date mailed notice

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Document #

United States District Court

Northern District of Illinois

Eastern Division

OLECH **JUDGMENT IN A CIVIL CASE**

v. Case Number: 97 C 4935

VILLAGE OF WILLOWBROOK et al

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED this action is dismissed in its entirety.

Michael W. Dobbins,
Clerk of Court

/s/ J. Smith
J. Smith, Deputy Clerk

Date: 4/13/98

NO. 98-2235

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

GRACE OLECH, Plaintiff-Appellant, -vs- VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, Defendants-Appellees.	) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 97 C 4935 Hon. George M. Marovich, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT GRACE OLECH

(Received Jul. 29, 1998)

JOHN R. WIMMER
928 Warren Avenue
Downers Grove, Illinois 60515
(630) 810-0005

Attorney for Plaintiff-Appellant

PLAINTIFF-APPELLANT'S
CERTIFICATE OF INTEREST

Appellate Court No: 98-2235

Short Caption: Olech v. Village of Willowbrook, *et al.*

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.

(1) The full name of every party or amicus the attorney represents in the case:

Grace Olech

(2) If such party or amicus is a corporation:

i) Its parent corporation, if any; and

N/A

ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:

N/A

(3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

The Law Offices of John R. Wimmer

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material

changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in from [sic] of the table of contents of the party's main brief.

Attorney's Signature: /s/ John R. Wimmer

Attorney's Printed Name: John R. Wimmer

Date: May 20, 1998

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TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The plaintiff-appellant, Grace Olech, filed this action in the United States District Court for the Northern District of Illinois, Eastern Division, against the defendants-appellees, Village of Willowbrook, an Illinois municipal corporation, Gary Pretzer, individually and as President of Willowbrook, and Philip J. Modaff, individually and as Director of Public Services of Willowbrook. The plaintiff's Amended Complaint (Appendix 2-11) consisted of one count brought against all of the defendants under 42 U.S.C. §1983 and alleged that the defendants had deprived Grace Olech of her rights under the Equal Protection Clause of the United States constitution. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343.

On April 13, 1998, the district court issued a Memorandum Opinion And Order (Appendix 24-33) which granted the defendants' motion to dismiss this action under Fed.R.Civ.P. 12(b)(6). Also on April 13, 1998, the district court issued a Judgment In A Civil Case on form AO 450 (Appendix 34) which provided that "this action is dismissed in its entirety." The judgment was entered by the clerk on April 15, 1998. (See page 5 of the clerk's docket sheet.) The plaintiff filed her Notice Of Appeal on

May 13, 1998, or within 30 days after the entry of the judgment. (Doc. 23) No motions were ever filed for alteration of the judgment, and no motions were ever filed which are claimed to have tolled the time within which to appeal. This appeal is from a final judgment that disposes of all claims with respect to all parties. This Court has appellate jurisdiction pursuant to 28 U.S.C §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court erred in dismissing Grace Olech's Amended Complaint because the Amended Complaint states a claim under 42 U.S.C. §1983 for violation of Grace Olech's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution under the principles of this Court's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), and whether the plaintiff "pled herself out of an action"?

STATEMENT OF THE CASE

The plaintiff-appellant, Grace Olech, filed this action against the defendants-appellees, the Village of Willowbrook, an Illinois municipal corporation, Gary Pretzer, individually and as President of Willowbrook, and Philip J. Modaff, individually and as Director of Public Services of Willowbrook. The action was filed under 42 U.S.C. §1983 and sought damages based on the violation of Mrs. Olech's rights under the Equal Protection Clause of the United States constitution. The defendants filed a motion to dismiss the action under Fed.R.Civ.P. 12(b)(6), and the district court granted that motion and entered judgment for the defendants.

STATEMENT OF FACTS

This action was commenced on July 11, 1997, when the plaintiff-appellant, Grace Olech ("Olech" or "Mrs. Olech") filed her Complaint (Doc. 1-1) in the United States District Court for the Northern District of Illinois, Eastern Division, against the defendants-appellees, the Village of Willowbrook, an Illinois municipal corporation ("Willowbrook"), Gary Pretzer, individually and as President of Willowbrook ("Pretzer"), and Philip J. Modaff, individually and as Director of Public Services of Willowbrook ("Modaff"). On October 8, 1997, Olech filed an Amended Complaint (Appendix 2-11), having received leave of court to do so. (Doc. 7)

In her Amended Complaint, Olech alleged that she was a citizen of the United States and a resident of Willowbrook. (Appendix 3) Olech brought the lawsuit under 42 U.S.C. §1983 to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Appendix 2)

According to the Amended Complaint, on August 8, 1989, Olech and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Willowbrook and other defendants in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 ("the state court lawsuit"), in which the plaintiffs sought money damages from Willowbrook and the other defendants as a result of the flooding of the plaintiffs' property by stormwater. (Appendix 3) Howard Brinkman's claims in the state

court were dismissed for want of prosecution on April 1, 1991. (Appendix 3-4) The Olechs' claim against Willowbrook in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Olech, individually and as special administrator of the estate of Thaddeus Olech, and against Willowbrook in the amount of $20,000.00, and judgment was entered on the verdict. (Appendix 4) The claim of Rodney C. Zimmer and Phyllis S. Zimmer against Willowbrook in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of the Zimmers and against Willowbrook in the amount of $135,000.00, and judgment was entered on that verdict. (Appendix 4) Grace Olech is Phyllis Zimmer's mother. (Appendix 3)

According to the Amended Complaint, the state court lawsuit against Willowbrook, which was ultimately determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Willowbrook, and generated substantial ill will toward the plaintiffs on the part of Willowbrook and its officers and employees, including Modaff and Pretzer. (Appendix 4) The Amended Complaint alleged that said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Willowbrook and its officers and employees look bad, from the erroneous belief on the part of Willowbrook's officers and employees that the state court lawsuit was frivolous and meritless, and from the fact that, prior to the filing of the state court lawsuit, Grace and Thaddeus Olech and Howard Brinkman had refused to grant certain drainage easements for a storm water drainage project favored by Willowbrook. (Appendix 4-5)

From a long time prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on November 24, 1996, Grace Olech and Thaddeus Olech were the joint owners of and resided in a single family home at 6440 Tennessee Avenue in Willowbrook, Illinois, on the west side of Tennessee Avenue. Since the death of Thaddeus, Grace Olech has been the sole owner of this property ("the Olech property") and has continued to reside there. (Appendix 5) In the spring of 1995 the private well on the Olech property, which provided potable water for the Olech home, broke down and was beyond repair. The Olechs then implemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney and Phyllis Zimmer, via an overground hose. (Appendix 5) At that time Willowbrook's water main on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of the Olechs on Tennessee Avenue. (Appendix 5)

By the spring of 1995 Willowbrook had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to Willowbrook's municipal water system, to hook up to the system. (Appendix 6)

On May 23, 1995, while the state court lawsuit was pending, Grace Olech and Thaddeus Olech, along with Howard Brinkman, and Rodney and Phyllis Zimmer, made a request to Willowbrook that their homes be hooked up right away to Willowbrook's municipal water supply system. At or about that time Modaff was

informed that the well on the Olech property had broken down, and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing. (Appendix 6) As required by law, Willowbrook undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each of the three parcels of property involved of one-third of the estimated cost of the project. (Appendix 6) On July 11, 1995, Grace and Thaddeus Olech paid to Willowbrook $7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Willowbrook had received the required payments from Howard Brinkman and the Zimmers. (Appendix 6-7)

According to the Amended Complaint, the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the Zimmer property is not, and never has been a dedicated public street, and no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue adjacent to the Brinkman, Olech, or Zimmer properties. (Appendix 7)

In August of 1995 Modaff told Phyllis Zimmer that Willowbrook would not proceed with the project unless all of the property owners involved granted Willowbrook a 33-foot easement along Tennessee Avenue, and in that same month Pretzer told Phyllis Zimmer that the 33-foot easement would be required for the project. (Appendix 7) On September 21, 1995, Modaff sent to Grace and Thaddeus Olech and to the other property owners involved a Plat of Easement whereby they and the property owners

on the other side of Tennessee Avenue would each dedicate to Willowbrook a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant to Willowbrook a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street. (Appendix 7)

According to the Amended Complaint, the defendants' demands for 33-foot easements and a 66-foot dedicated street as a condition of the extension of the water main were not consistent with the policy of Willowbrook regarding other property in Willowbrook. The Village Attorney, Gerald M. Gorski, eventually admitted as much in a letter dated November 10, 1995, in which he stated as follows:

> [A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."
>
> (Appendix 8)

The Amended Complaint alleges that the defendants treated Grace and Thaddeus Olech, Howard Brinkman, and Rodney and Phyllis Zimmer differently from other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of the Olechs and the other plaintiffs in the state court lawsuit, by the use of ditches and swales along

Tennessee Avenue. (Appendix 8) The Amended Complaint alleges that the defendants' decision to treat the Olechs and the other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main was irrational and wholly arbitrary, and was made by the appropriate policy-making official or employee of Willowbrook. (Appendix 8)

According to the Amended Complaint, because the 33-foot easements and the 66-foot dedicated street demanded by the defendants were not consistent with what the defendants required in relation to other property in the Village of Willowbrook, Grace and Thaddeus Olech and the other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication. (Appendix 8-9) And from the time that Modaff first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project. (Appendix 9)

On November 10, 1995, Willowbrook relented and withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Willowbrook were granted a 15-foot easement for the water main and for related water service lines used to connect the homes. (Appendix 9) The easement demanded by Willowbrook in its attorney's letter of November 10, 1995, was consistent with what was required by Willowbrook in relation to other property in Willowbrook, and, therefore, Grace and Thaddeus Olech, and the other property owners involved agreed to grant that easement. (Appendix 9)

The Amended Complaint alleged that the initial refusal of the defendants to proceed with the project unless Willo..brook was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather. (Appendix 9) In November of 1995 the overground hose used by Grace and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Grace and Thaddeus Olech were without running water from November of 1995 until the project was completed on March 19, 1996. (Appendix 9-10) The Amended Complaint alleges that "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress." (Appendix 10) The Amended Complaint alleges that the initial refusal of the defendants to proceed with the project unless Willowbrook was granted the 33-foot easements and 66-foot street dedication "and the concomitant and resulting delay in the project" deprived Grace Olech of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the defendants in that regard were undertaken either with the intent to deprive Grace Olech and others of those rights, or in reckless disregard of those rights. (Appendix 10) Finally, the Amended

Complaint alleged that the actions and inactions of the defendants set forth therein were undertaken under color of state law. (Appendix 10) Grace Olech sought compensatory and punitive damages as well as an award of her reasonable attorney's fees under 42 U.S.C. §1988. (Appendix 10-11)

The defendants filed a Motion To Dismiss Plaintiff's Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) (Appendix 13-14), which incorporated by reference a Memorandum Of Law In Support Of Motion To Dismiss (Appendix 14-22) In the memorandum, the defendants presented two arguments in support of their request for dismissal under Rule 12(b)(6). First, the defendants argued that the Amended Complaint did not allege a violation of the Equal Protection Clause pursuant to this Court's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), because the Amended Complaint "lacks sufficient allegations of malice on the part of the defendants." (Appendix 20-21) The defendants also argued that the plaintiff had "pled herself out of an action by alleging that other homeowners were asked to grant a 33-foot easement." (Appendix 21-22)

The plaintiff filed Plaintiff's Response To Defendants' Motion To Dismiss The Amended Complaint (Doc. 18), and the defendants filed a Reply (Doc. 19), and on April 13, 1998, the district court issued its ruling. The district court held that "the alleged treatment of Olech by Willowbrook and its officers – as well as the alleged motivation behind this treatment – is not sufficient to state an equal protection claim under the standards as set forth in *Esmail*." (Appendix 32-33) Pursuant to its ruling, the district court issued a Judgment In A Civil Case on Form AO 450 which

provided that "this action is dismissed in its entirety." (Appendix 34) That judgment was entered by the clerk on April 15, 1998. (See page 5 of the clerk's docket sheet.) Grace Olech filed a Notice Of Appeal on May 13, 1998. (Doc. 23)

SUMMARY OF ARGUMENT

The district court erred in dismissing Grace Olech's Amended Complaint because the Amended Complaint stated a claim under 42 U.S.C. §1983 for violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution. Grace Olech's Amended Complaint adequately set forth that she was treated differently by Willowbrook and its President and Director of Public Services from other property owners in the village with regard to the extension of the village's water main to service her property. Mrs. Olech also adequately alleged that the unequal treatment was the result of vindictive ill will on the part of the defendants, which resulted from a state court lawsuit, and that the unequal treatment was undertaken for improper purposes. The allegations adequately set forth a violation of Mrs. Olech's rights under the Equal Protection Clause pursuant to this Court's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995).

Moreover, Mrs. Olech has not "pled herself out of an action" as the defendants argued in the district court. The allegations of the Amended Complaint properly allege that the defendants' unequal treatment was of and directed to the plaintiffs in the state court lawsuit, and not to other people.

ARGUMENT

I. Standard of Review of a Dismissal under Fed.R.Civ.P. 12(b)(6).

Grace Olech's Amended Complaint was dismissed under Fed.R.Civ.P. 12(b)(6) for "failure to state a claim upon which relief can be granted." In evaluating a dismissal under this rule, it must be kept in mind that the Federal Rules of Civil Procedure establish "a system of notice pleading." (*Hrubec v. National Railroad Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992).) Accordingly, "[a] complaint need not narrate all relevant facts or recite the law; all it has to do is set out a claim for relief." (*Hrubec*, 981 F.2d 962, 963.) As stated by the United States Supreme Court in *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984):

> "At this stage of the litigation [a motion to dismiss], we must accept petitioner's [the plaintiff's] allegations as true. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

Complaints are construed favorably to the plaintiff (*Hrubec*, 981 F.2d 962, 963), and the court accepts as true all reasonable inferences drawn from well-pleaded factual allegations (*Mount v. LaSalle Bank Lake View*, 926 F.Supp. 759, 763 (N.D.Ill. 1996)). The court must construe the pleadings liberally, and mere vagueness or lack of detail alone does not constitute sufficient grounds to dismiss a complaint. (*Mount*, 926 F.Supp. 759, 763.) Moreover, as stated by this Court in *Hrubec:*

> "A plaintiff need not put all of the essential facts in the complaint. He may add them by affidavit or brief – even a brief on appeal."
>
> (981 F.2d 962, 963-964.)

In fact, a plaintiff may provide the court with an unsubstantiated version of the events, provided it is consistent with the complaint, to show that the complaint is not subject to dismissal. (*Cushing v. City of Chicago*, 3 F.3d 1156, 1160 (7th Cir. 1993).) The latter rule "is necessary to give plaintiffs the benefit of the broad standard for surviving a Rule 12(b)(6) motion as articulated in *Hishon* [citation omitted], and *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)." *Cushing*, 3 F.3d 1156, 1160.

II. The District Court erred in dismissing Grace Olech's Amended Complaint because the Amended Complaint states a claim under 42 U.S.C. §1983 for violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution under the principles of this Court's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), and because the plaintiff has not "pled herself out of an action" by alleging that other homeowners were asked to grant a 33-foot easement.

As stated by this Court in *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995), there are two common kinds of cases under 42 U.S.C. §1983 involving violation of the Equal Protection Clause. This Court stated:

> "One involves charges of singling out members of a vulnerable group, racial or otherwise, for unequal treatment. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985). The other, which rarely succeeds nowadays, involves challenges to laws or policies alleged to make irrational distinctions, *Lindsey v. Normet*, 405 U.S. 56, 74-79, 92 S.Ct. 862, 874-77, 31 L.Ed.2d 36 (1972), for example in tax rates."

In *Esmail* this Court recognized the validity of a third kind of equal protection case.

In *Esmail* the plaintiff, Basim Esmail, a liquor dealer, alleged that officials of the City of Naperville had developed a deep-seated animosity toward his as a result of his success in getting Naperville's revocation of his retail liquor license reduced by the state liquor control commission to a suspension, as a result of Esmail's advertising campaign accusing Naperville officials of ineffectual enforcement of the law prohibiting the sale of alcohol to minors, and as a result of Esmail's withdrawal of financial and political support for the mayor. (53 F.3d 176, 178.) Esmail alleged that in 1992 Naperville denied two of his liquor license applications based on trivial or trumped-up charges while Naperville routinely granted liquor licenses to persons who engaged in similar conduct. (53 F.3d 176, 178.) Esmail alleged that the denials of his liquor license applications were for the purpose of exacting retaliation and vengeance. (53 F.3d 176, 178.) Esmail alleged that he was required to spend substantial attorney's fees to get his liquor license applications finally granted through the intervention of the state courts. (53 F.3d 176, 177.) This Court held that Esmail's complaint adequately set forth a violation of the equal protection

clause. In language pertinent to Mrs. Olech's case, this Court stated:

> "The distinctive feature here, which the district judge did not discuss, is that the unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor.
>
> Our decision in *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), holds that such conduct, so motivated, violates the equal protection clause; and the holding, although it has rarely brought ultimate victory to a plaintiff, does not stand alone. *Vukadinovich v. Board of School Trustees*, 978 F.2d 403, 414 and n. 9 (7th Cir. 1992); *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1547 (7th Cir. 1989); *Yerardi's Moody Street Restaurant v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981). . . . If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court."
>
> 53 F.3d 176, 179.

In this case, Grace Olech has alleged a case under 42 U.S.C. §1983 for violation of her rights under the Equal Protection Clause under the principles of this Court's decision in *Esmail*. Mrs. Olech has certainly alleged unequal treatment. She has alleged that the defendants treated her and other plaintiffs in the state court lawsuit "differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and

the 66-foot dedicated street as a condition of the extension of the [village's] water main" to service their property. (Appendix 8) Mrs. Olech alleged that the demands of the defendants for 33-foot easements and a 66-foot dedicated public street as a condition of the extension of the water main "were not consistent with the policy of Defendant VILLAGE OF WILLOWBROOK regarding other property in the Village of Willowbrook" (Appendix 7-8), and that the Village Attorney eventually admitted as much in a letter dated November 10, 1995, in which he stated as follows:

> "[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."
>
> (Appendix 8)

Moreover, Grace Olech alleged that the unequal treatment was the result of a vindictive animosity on the part of village officials. Mrs. Olech alleged that the state court lawsuit, in which she and other plaintiffs won substantial damages from Willowbrook as a result of the flooding of their property by stormwater (Appendix 3-4), was the subject of substantial coverage in the local press. (Appendix 4) Mrs. Olech alleged that the state court lawsuit generated substantial ill will on the part of Willowbrook and its officers and employees, including Modaff and Pretzer. (Appendix 4) Mrs. Olech alleged that this ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Willowbrook and its officers and employees look bad; the erroneous belief on the part of the officers and employees

of Willowbrook that the state court lawsuit was frivolous and meritless; and the fact that, prior to the filing of the state court lawsuit, Grace and Thaddeus Olech and Howard Brinkman had refused to grant certain drainage easements for a stormwater drainage project favored by Willowbrook. (Appendix 5) Finally, Mrs. Olech alleged that the defendants treated her, Howard Brinkman, and the Zimmers differently from other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main "because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue." (Appendix 8) (Obviously, with a dedicated street, Willowbrook would be able to influence stormwater drainage by way of the ditches at the side of the street.) Mrs. Olech has alleged unequal treatment as a result of vindictive animosity.

Moreover, the Amended Complaint alleged that the defendants' illegal demands were the cause of Mrs. Olech's injury. Mrs. Olech alleged that from the time Modaff first demanded the 33-foot easements in August of 1995 until Willowbrook withdrew its demands on November 10, 1995, no progress was made on the project (Appendix 9), and that the initial refusal of the defendants to proceed with the project unless Willowbrook was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, "a delay which proved critical as a result of the approaching winter weather." (Appendix 9) The

Amended Complaint alleges that in November of 1995, the overground hose used by the Olechs to connect to their neighbors' well froze, and, therefore, the Olechs were without running water from November of 1995 until the project was completed on March 19, 1996. (Appendix 9-10) Finally, the Amended Complaint alleged that the Olechs were without running water during the winter of 1995-1996 and suffered great inconvenience, humiliation, and mental and physical distress "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication." The Amended Complaint should not have been dismissed.

The district court attempted to distinguish *Esmail* from this case by stating that *Esmail* involved "malignant animosity" as opposed to the "ill will" alleged in this case. It is respectfully suggested that "animosity" and "ill will" are synonymous, and while Mrs. Olech did not explicitly characterize the "ill will" in this case as "malignant", which means evil, the well-pleaded facts of the Amended Complaint show that the ill will was, in fact, evil and not beneficial. The motives of the defendants were to get back at the plaintiffs in the state court lawsuit, and to control stormwater drainage in the vicinity to their detriment.

The district court also attempted to distinguish *Esmail* on the basis that it involved an "orchestrated campaign of official harassment" and this case did not. The word "campaign" connotes an extended series of events. Although *Esmail* involved such a campaign, this

Court did not hold that a plaintiff could not allege an equal protection violation unless he could show an "orchestrated campaign of official harassment." What this Court required was that the plaintiff plead "unequal treatment" resulting from "animosity", vindictiveness, or bad faith on the part of the government officials involved. (53 F.3d 176, 179.) Significantly, in *Esmail* this Court cited *Ziegler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981), as a case applying its holding, and in *Ziegler* there was no allegation of an orchestrated campaign of official harassment. The allegation in *Ziegler* was simply that the plaintiff's rights under the equal protection clause were violated when a state agency refused to let him become a policeman because of certain prior convictions he had where the agency "had waived the character requirement for other individuals convicted of similar or more serious crimes." (638 F.2d 778-779.) Moreover, the court in *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989), another case cited by this Court in *Esmail* as a case applying its holding, stated the principle as follows:

> "[L]iability in the instant type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, *or malicious or bad faith intent to injure a person*." (Emphasis added.)
>
> (878 F.2d 16, 21.)

The Court in *Yerardi's* did not require a showing of "an orchestrated campaign of official harassment." Unequal treatment undertaken maliciously or in bad faith to injure a person is enough. Finally, the case of *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), cited by this Court in *Esmail* as a basis for its holding, did not involve an orchestrated campaign of official harassment or "sheer vindictiveness". It involved action by the city in terminating the employment of a paramedic based on an incident which received substantial press coverage where another paramedic who was equally responsible in the incident was not punished. What *Esmail* requires is that the plaintiff show unequal treatment resulting from vindictiveness, animosity, or other improper purpose of the government officials involved, and Mrs. Olech has alleged that in this case.

The district court also stated that Mrs. Olech's allegations that Willowbrook was acting out of vindictiveness were legal conclusions unsupported by factual assertions. The district court's statements in this regard are difficult to understand. Mrs. Olech alleged the facts involved in the state court lawsuit. (Appendix 3-4) She described the coverage of the state court lawsuit in the local press and alleged in detail in paragraph 12 of the Amended Complaint the facts giving rise to the ill will on the part of the defendants toward the plaintiffs in that state court lawsuit. (Appendix 4-5) And Mrs. Olech alleged that the defendants treated her differently that [sic] other property owners in Willowbrook "because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech,

and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue," which Willowbrook would have controlled if the street had been dedicated. (Appendix 8) The factual detail here is certainly as extensive as that in *Esmail*. And even if it were not, lack of detail alone does not constitute sufficient grounds to dismiss a complaint (*Mount v. LaSalle Bank Lake View*, 926 F.Supp. 759, 763 (N.D.Ill. 1996)) under the federal system of notice pleading unless one can say that there is no set of facts consistent with the allegations of the complaint which would entitle the plaintiff to relief. The district court erred by ruling that Mrs. Olech's Amended Complaint was subject to dismissal because her allegations of vindictiveness were not sufficiently detailed. A plaintiff's complaint "need not narrate all relevant facts . . . ; all it has to do is set out a claim for relief." *Hrubec v. National Railroad Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992).

The defendants argued in their Memorandum Of Law In Support Of Motion To Dismiss that Mrs. Olech had "pled herself out of an action" by alleging that Willowbrook demanded that property owners on the other side of Tennessee Avenue grant a 33-foot easement. The defendants argued that the fact that they demanded a 33-foot easement from the owners of property across the street from Mr. Brinkman, the Olechs, and the Zimmers showed that the defendants were not acting out of ill will toward the plaintiffs in the state court lawsuit, Howard Brinkman, the Olechs, and the Zimmers.

The defendants' argument in this regard is without merit and is based on either a careless or a contrived reading of the Amended Complaint and a misstatement

of the facts. There are no homes on the east side of Tennessee Avenue across from Mr. Brinkman, the Olechs, and the Zimmers, nor does the Amended Complaint allege that there are. The homes to the east of the Olechs, the Zimmers, and Mr. Brinkman are not on Tennessee Avenue but are on all the way over on the next street to the east, Clarendon Hills Road, and in the spring of 1995, those homes already had municipal water. (Doc. 18, p. 11) The Amended Complaint is not to the contrary. What the Amended Complaint alleged was that the defendants demanded the 33-foot easements and 66-foot street dedication as a condition of extending the water main at the request of the Olechs, the Zimmers, and Howard Brinkman, the plaintiffs in the state court lawsuit that *their* homes be hooked up to the municipal water supply. (Appendix 6-7) In effect, the defendants told the Olechs, the Zimmers, and Howard Brinkman that they would not get municipal water unless and until they granted the 33-foot easements and obtained such easements from the property owners across the street who already had municipal water. The defendants' illegal demands were directed at the plaintiffs in the state court lawsuit and not at anyone else.

The Defendants' argument in this regard is similar to the argument that, when a black person and his white friend are denied admission to a public accommodation because of the black person's race, the black person cannot recover because his white friend was also excluded. That argument does not fly (*Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949)), nor does the defendants' argument here have any merit. The amended complaint alleges that the defendants illegal demands were the result of ill will

against the plaintiffs in the state court lawsuit and constituted an attempt to control stormwater drainage in the vicinity to the detriment of the plaintiffs in the state court lawsuit by the use of ditches and swales along Tennessee Avenue, and that allegation must be accepted as true. Mrs. Olech has not "pled herself out of an action."

Mrs. Olech's Amended Complaint adequately set forth a cause of action under 42 U.S.C. §1983 for violation of her rights under the Equal Protection Clause, and the district court erred in dismissing the action.

CONCLUSION

For the reasons stated herein, the plaintiff-appellant, Grace Olech, respectfully requests this Court to reverse the judgment entered in favor of the defendants in this action, and to remand this cause for further proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ John R. Wimmer
John R. Wimmer

JOHN R. WIMMER
Attorney at Law
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(630) 810-0005

APPENDIX

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CERTIFICATE OF COMPLETENESS OF APPENDIX

John R. Wimmer, counsel for the plaintiff-appellant, Grace Olech, hereby certifies that all of the materials required by parts (a) and (b) of Circuit Rule 30 are included in this Appendix.

/s/ John R. Wimmer
John R. Wimmer

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH, Plaintiff, -vs- VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, Defendants.	)	No. 97 C 4935 Judge Marovich Magistrate Judge Keys Plaintiff Demands Trial by Jury

AMENDED COMPLAINT

(42 U.S.C. § 1983)

(Filed Oct. 08, 1997)

NOW COMES Plaintiff GRACE OLECH, by and through her attorney, JOHN R. WIMMER, and complaining of the Defendants, VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and

as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, alleges and states as follows:

1. That Plaintiff GRACE OLECH has brought this action to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution.

2. That jurisdiction over this action has been conferred upon this Court under 28 U.S.C. § 1331 and § 1334, and 42 U.S.C. § 1983.

3. That Plaintiff GRACE OLECH is, and at all times hereinmentioned was, a citizen of the United States and a resident of Willowbrook, DuPage County, Illinois, and Plaintiff GRACE OLECH is the mother of Phyllis S. Zimmer who is mentioned hereinafter.

4. That Defendant VILLAGE OF WILLOWBROOK is, and at all times hereinmentioned was, a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois.

5. That Defendant GARY PRETZER is an individual who is President of Defendant VILLAGE OF WILLOWBROOK and was President of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

6. That Defendant PHILIP J. MODAFF is an individual who was Director of Public Services of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her

home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

7. That on August 8, 1989, Plaintiff GRACE OLECH and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Defendant VILLAGE OF WILLOWBROOK and others in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 (hereinafter "the state court lawsuit"), in which the plaintiffs sought money damages from Defendant VILLAGE OF WILLOWBROOK and others as a result of the flooding of the plaintiffs' property, including what is hereinafter referred to as the Olech property, by stormwater.

8. That Howard Brinkman's claims in the state court case were dismissed for want of prosecution on April 1, 1991.

9. That the claim of Plaintiff GRACE OLECH and Thaddeus Olech against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Plaintiff GRACE OLECH, individually and as special administrator of the estate of Thaddeus Olech, and against Defendant VILLAGE OF WILLOWBROOK in the amount of $20,000.00, and judgment was entered on that verdict.

10. That the claim of Rodney C. Zimmer and Phyllis S. Zimmer against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Rodney C. Zimmer and Phyllis S. Zimmer and against

Defendant VILLAGE OF WILLOWBROOK in the amount of $135,000.00, and judgment was entered on that verdict.

11. That the state court lawsuit against Defendant VILLAGE OF WILLOWBROOK, which was ultimately determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Defendant VILLAGE OF WILLOWBROOK, and generated substantial ill will on the part of Defendant VILLAGE OF WILLOWBROOK and its officers and employees, including PHILIP J. MODAFF and, on information and belief, Defendant GARY PRETZER toward the plaintiffs in the state court lawsuit.

12. That, on information and belief, said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Defendant VILLAGE OF WILLOWBROOK and its officers and employees look bad; the erroneous belief on the part of officers and employees of Defendant VILLAGE OF WILLOWBROOK that the state court lawsuit was frivolous and meritless; and the fact that, prior to the filing of the state court lawsuit, Plaintiff GRACE OLECH and Thaddeus Olech, and Howard Brinkman had refused to grant certain drainage easements for a stormwater drainage project favored by Defendant VILLAGE OF WILLOWBROOK.

13. That, from a time long prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on or about November 24, 1996, Plaintiff GRACE OLECH and Thaddeus Olech resided in a single-family home on, and were the joint owners of, certain property commonly known as 6440 Tennessee Avenue, Willowbrook, Illinois

60514 (hereinafter referred to as "the Olech property") and legally described as follows:

> "The East half of the North half of the South half on the Southwest quarter of the Northeast quarter of the Northeast quarter of Section 22, Township 38 North, Range 11, East of the Third Principal Meridian in DuPage County, Illinois."

14. That, since the death of Thaddeus Olech, Plaintiff GRACE OLECH has been the sole owner of the Olech property and has continued to reside thereon.

15. That in the spring of 1995 the private well on the Olech property, which had theretofore provided potable water for the Olech home, broke down and was beyond repair.

16. That Plaintiff GRACE OLECH and Thaddeus Olech then and there implemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney C. Zimmer and Phyllis S. Zimmer, via an overground hose.

17. That at that time the water main of Defendant VILLAGE OF WILLOWBROOK on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of Plaintiff GRACE OLECH and Thaddeus Olech.

18. That by the spring of 1995 Defendant VILLAGE OF WILLOWBROOK had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on Tennessee Avenue who were not hooked up to the municipal water supply system of Defendant VILLAGE OF

WILLOWBROOK to hook up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

19. That on or about May 23, 1995, and while the state court lawsuit was pending, Plaintiff GRACE OLECH and Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, made a request to Defendant VILLAGE OF WILLOWBROOK that their homes be hooked up right away to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK, and at or about that time Defendant PHILIP J. MODAFF was informed that the well on the Olech property had broken down and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing.

20. That, as required by law, Defendant VILLAGE OF WILLOWBROOK undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each parcel of property involved of one-third of the estimated cost of the project.

21. That on or about July 11, 1995, Plaintiff GRACE OLECH and Thaddeus Olech paid to Defendant VILLAGE OF WILLOWBROOK $7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Defendant VILLAGE OF WILLOWBROOK had received the required payments from Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer.

22. That the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property of Rodney C. Zimmer and

Phyllis S. Zimmer is not, and never had been, a dedicated public street, and, on information and belief, no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property owned by Rodney C. Zimmer and Phyllis S. Zimmer.

23. That in August of 1995 Defendant PHILIP J. MODAFF told Phyllis S. Zimmer that Defendant VILLAGE OF WILLOWBROOK would not proceed with the project unless all of the property owners involved granted Defendant VILLAGE OF WILLOWBROOK a 33-foot easement along Tennessee Avenue.

24. That in August of 1995 Defendant GARY PRETZER told Phyllis Zimmer that the 33-foot easement would be required for the project.

25. That on or about September 21, 1995, Defendant PHILIP J. MODAFF sent to Plaintiff GRACE OLECH and Thaddeus Olech and to other property owners involved a Plat of Easement whereby they and property owners on the other side of Tennessee Avenue would each dedicate a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street.

26. That the demands of the Defendants for 33-foot easements and a 66-foot dedicated public street as a condition of the extension of the water main were not consistent with the policy of Defendant VILLAGE OF WILLOWBROOK regarding other property in the Village

of Willowbrook; as was ultimately admitted by the Village Attorney, Gerald M. Gorski, in a letter dated November 10, 1995, "[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

27. That the Defendants treated Plaintiff GRACE OLECH and Thaddeus Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue.

28. That the decision by the Defendants to treat Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot street dedication as a condition for the extension of the water main was irrational and wholly arbitrary, and, on information and belief, was made by the appropriate policy-making official or employee of Defendant VILLAGE OF WILLOWBROOK.

29. That, because the 33-foot easements and the 66-foot dedicated street demanded by the Defendants were

not consistent with what the Defendants required in relation to other property in the Village of Willowbrook, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication.

30. That from the time that Defendant PHILIP J. MODAFF first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project.

31. That on or about November 10, 1995, Defendant VILLAGE OF WILLOWBROOK withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Defendant VILLAGE OF WILLOWBROOK were granted a 15-foot easement for the water main and for the related water service lines used to connect to the homes.

32. That the easement demanded by Defendant VILLAGE OF WILLOWBROOK in its attorney's letter of November 10, 1995, was consistent with what was required by Defendant VILLAGE OF WILLOWBROOK in relation to other property in the Village of Willowbrook, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved, agreed to grant said easement.

33. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather.

34. That in November of 1995 the overground hose used by Plaintiff GRACE OLECH and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech were without running water from November of 1995 until the project was completed on or about March 19, 1996.

35. That as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress.

36. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and 66-foot street dedication and the concomitant and resulting delay in the project deprived Plaintiff GRACE OLECH of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the Defendants in that regard were undertaken either with the intent to deprive Plaintiff GRACE OLECH and others of said rights, or in reckless disregard of said rights.

37. That the actions and inactions of the Defendants set forth above were undertaken under color of state law.

WHEREFORE, Plaintiff GRACE OLECH prays that this Court:

(a) Award Plaintiff GRACE OLECH compensatory damages in an amount to be determined by the trier of fact;

(b) Award Plaintiff GRACE OLECH punitive damages in an amount to be determined by the trier of fact;

(c) Award Plaintiff GRACE OLECH her reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988; and

(d) Grant Plaintiff GRACE OLECH such other and further relief as is proper and just in the premises.

GRACE OLECH

By: /s/ John R. Wimmer
Attorney for the Plaintiff

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928 Warren Avenue
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(630) 810-0005
Attorney No. 03125600

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH, *Plaintiff,*	)	
vs.	)	**NO. 97 C 4935**
VILLAGE OF WILLOWBROOK, an Illinois Municipal Corporation, GARY PRETZER, Individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, Individually and as Director of Public Services for Defendant VILLAGE OF WILLOWBROOK, *Defendants.*	)	**Judge Marovich**

MOTION TO DISMISS
PLAINTIFF'S AMENDED COMPLAINT

(Received Oct. 28, 1997)

NOW COME the Defendants, the Village of Willowbrook, Gary Pretzer and Philip J. Modaff, by their attorneys, Robert C. Yelton III and Jeffrey Edward Kehl of Dowd & Dowd, Ltd., and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, move this court to dismiss the Plaintiff's Complaint for failure to state a cause of action upon which relief may be granted. For this Motion, the Defendants would show this court as follows:

1. On October 8, 1997, the Plaintiff caused her one count Amended Complaint to be filed against the Village

of Willowbrook and two of its employees, Gary Pretzer and Philip J. Modaff (A copy of the Plaintiff's Amended Complaint is attached hereto and incorporated herein as Exhibit A).

2. The Plaintiff seeks relief under 42 U.S.C. § 1983 for what the Plaintiff alleges to be a violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Plaintiff's Amended Complaint, ¶ 1).

3. As more specifically submitted in the Defendants' Memorandum of Law in Support of Motion to Dismiss filed contemporaneously herewith, the Defendants contend that the Plaintiff has failed to state a cause of action upon which relief may be granted because she has not alleged discrimination based upon her exercise of constitutional rights.

WHEREFORE, the Defendants respectfully request this court to enter an order dismissing the Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dowd & Dowd, Ltd.

/s/ Jeffrey Edward Kehl
Jeffrey Edward Kehl
One of the Attorneys
for the Defendants

Robert C. Yelton III
Jeffrey Edward Kehl
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(312) 704-4400
Counsel for the Defendants

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH, *Plaintiff,*	)	
vs.	)	**NO. 97 C 4935**
VILLAGE OF WILLOWBROOK, an Illinois Municipal Corporation, GARY PRETZER, Individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, Individually and as Director of Public Services for Defendant VILLAGE OF WILLOWBROOK, *Defendants.*	)	**Judge Marovich**

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

(Received Oct. 28, 1997)

NOW COME the Defendants, the Village of Willowbrook, Gary Pretzer, and Philip J. Modaff, by their attorneys, Robert C. Yelton III and Jeffrey Edward Kehl of Dowd & Dowd, Ltd., and submit the following matters for the court's consideration in ruling on the Defendants' Motion to Dismiss the Plaintiff's Amended Complaint.

Preface

The Plaintiff's Amended Complaint seeks relief under 42 U.S.C. § 1983 for what the Plaintiff perceives to be a violation of her rights under the Equal Protection

Clause of the Fourteenth Amendment to the United States Constitution. The Defendants have filed a Motion to Dismiss because the Amended Complaint fails to state a cause of action upon which relief may be granted. As will be demonstrated below, the facts alleged by the Plaintiff do not support the conclusion that the Defendants violated her right to equal protection under the laws of this State. As such, no remedy is available to the Plaintiff under 42 U.S.C. § 1983.

Standard of Review

In considering a Motion to Dismiss, this court is obligated to view all factual allegations in the light most favorable to the Plaintiff. A motion to dismiss will not be granted unless it appears from the complaint that the Plaintiff can prove no set of facts to support her claims that would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 954 (7th Cir. 1989). To this end, all well-pleaded facts are taken as true. *City of Milwaukee v. Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976).

This does not mean, however, that extensive factual allegations or even a factual dispute will immunize a complaint from dismissal under Rule 12(b)(6). Rather, even with all facts being accepted by the court, the Plaintiff must still present a cause of action as a matter of law. *Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 433 (7th Cir. 1978).

More importantly, this court is not "to ignore any facts set forth in the complaint that undermine the plaintiff's claim or to assign any weight to unsupported

conclusions of law." *D'City National Bank v. Checker, Simon & Rosner*, 32 F.3d 277, 281 (7th Cir. 1994) (*quoting Dimming v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993).

Factual Background

The Amended Complaint alleges that prior to the Spring of 1995, the Village of Willowbrook developed a plan under which all houses along Tennessee Avenue in Willowbrook were to be hooked up to the Village's water system. The plan was to be implemented within two years of the Spring of 1995. (Amended Complaint, ¶ 18). As part of this two-year plan, homeowners could be connected to the Village water system only if they paid one-third of the total cost for the connection. (Amended Complaint, ¶ 20). In addition, homeowners on both sides of Tennessee Avenue would be required to grant a 33 foot easement to the Village. (Amended Complaint, ¶ 25).

According to the Plaintiff, in the Spring of 1995, the private well servicing her residence at 6440 Tennessee Avenue in Willowbrook, Illinois broke down. (Amended Complaint, ¶ 17). In order to have water available in her house, the Plaintiff had a garden hose run from her neighbor's house to hers. (Amended Complaint, ¶ 16).

On May 23, 1995, the Plaintiff and her adjoining neighbors, the Zimmers and the Brinkmans, made a written request to the Village to have their residences connected to the Village's water system "right away." (Amended Complaint, ¶ 19). Nearly two months later, on July 11, 1995, the Plaintiff paid the Village her share of the cost for the proposed connection under the two-year

plan. (Amended Complaint, ¶ 21). The Plaintiff's adjoining neighbors, the Brinkmans and the Zimmers paid shortly thereafter. (Amended Complaint, ¶ 21). The Plaintiff makes no mention of when the homeowners on the other side of Tennessee Avenue paid their shares, if ever.

The Plaintiff claims that notice of the proposed 33 foot easement was not given to her neighbor until August 1995. (Amended Complaint, ¶¶ 23-24). Written notice was sent to the Plaintiff in September of that year. (Amended Complaint, ¶ 25). In any event, the Plaintiff alleges that the demand for a 33 foot easement was not acceptable to her. As such, she and some of the other property owners refused to grant the Village the requested easement. (Amended Complaint, ¶ 29).

Subsequently, on November 10, 1995, the Village sent a letter to the Plaintiff which apparently indicated that a street dedication was not necessary to complete the job but that a temporary construction easement and a permanent easement of fifteen feet would be required. According to the Amended Complaint, a letter from the Village Attorney indicated that a 15 foot easement would be consistent with Village policy regarding all other property in the Village. (Amended Complaint, ¶ 26).

The Plaintiff alleges that because the fifteen foot easement was consistent with requirements for other properties in the Village, she and other property owners agreed to grant the required easement. The Plaintiff does not allege that all affected property owners granted the easement, or if so, when. (Amended Complaint, ¶ 32).

In November, 1995 the hose running from to [sic] the Plaintiff's house broke, leaving her with no running

water until the two-year project was completed on March 19, 1996. (Amended Complaint, ¶ 34). The Plaintiff does not explain why a new hose was not implemented, why she never had her well fixed, or how the lack of running water in late 1995 differed from her predicament in the Spring of 1995.

In any event, the Plaintiff claims that "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless [the Village] was granted the 33-foot easement and the 66-foot street dedication, [the Plaintiff was] without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress." (Amended Complaint, ¶ 35).

For her action, the Plaintiff maintains that the initial refusal to proceed without a 33 foot easement and the three-month delay before a 15-foot easement was required deprived her of her rights under the Equal Protection Clause of the Fourteenth Amendment. (Amended Complaint, ¶ 36). Specifically, the Plaintiff claims that the refusal to proceed without a 33-foot easement was prompted by "ill will" on the part of the Defendants because the Plaintiff, the Zimmers, and Howard Brinkman had filed a lawsuit against the Village. (Amended Complaint, ¶¶ 11-12). However, as the Plaintiff concedes, the action brought by Mr. Brinkman had been dismissed in 1991, and the Plaintiff's own action, viewed as frivolous by the Village in 1995, did not result in a judgment in favor of the Plaintiff until 1997. (Amended Complaint, ¶¶ 7-10).

The Plaintiff does not explain how the alleged "ill will" harbored by the Village toward the Plaintiff, Zimmers, and Mr. Brinkman manifested itself other than by the requirement that the homeowners grant a 33-foot easement. The fact that the 33-foot easement was also required of property owners on the other side of Tennessee Avenue, (Amended Complaint, ¶ 25), who had not sued the Village and for whom there are no allegations of "ill will" is, as discussed below, most destructive to the Plaintiff's claim.

Argument

The Plaintiff Fails to Allege a Cause of Action under § 1983 for any Violation of her Rights Under the Equal Protection Clause of the Fourteenth Amendment.

The Plaintiff seeks to impose § 1983 liability on the Defendants under what has been colloquially known as "Category Three" discrimination. Within the general rubric of equal protection law, a plaintiff must show disparate treatment based on membership in a vulnerable group, racial or otherwise, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985), or based upon the application of laws or policies which make irrational distinctions. *Lindsey v. Normet*, 405 U.S. 56, 74-79, 92 S.Ct. 862, 874-77, 31 L.Ed.2d 36 (1972). "Category Three" discrimination, however, occurs where "a powerful public official picked on a person out of sheer vindictiveness," and where there is "an orchestrated campaign of official harassment" directed at the individual "out of sheer malice." *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995).

The Plaintiff, by including many allegations regarding the state court action she and others brought against the Village, and by alleging that that lawsuit created "ill will" on the part of the Defendants, seeks to hawk this otherwise federally insignificant series of events as a matter of great constitutional import. The Defendants submit that this case has no business being in federal court for two reasons. First, the allegations do not sufficiently plead malice on the part of the Defendants. Second, the allegations of the Amended Complaint establish that the Plaintiff was treated no differently than homeowners against whom the Village harbored no "ill will."

1. The Amended Complaint Lacks Sufficient Allegations of Malice on the Part of the Defendants.

As indicated above, "Category Three" discrimination requires fats [sic] which establish "an orchestrated campaign of official harassment" directed at the individual "out of sheer malice." *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). All the Plaintiff can muster here is allegations that the Defendants harbored "ill will" against the Plaintiff because of her prior lawsuit. No facts are set forth that show any "orchestrated campaign" or any ugly motive approaching "malice." Unless the Plaintiff can paint a more evil picture of the Defendants, her action should be dismissed for failure to state a cause of action upon which relief may be granted.

2. The Plaintiff Has Pled Herself Out of an Action By Alleging that Other Homeowners Were Asked to Grant a 33-Foot Easement.

The Plaintiff claims that her right to equal protection was violated by the Village because the Village wanted

her to grant a 33-foot easement only because she had filed a state court action against the Village. This argument is defeated by the Plaintiff's own allegations.

The Plaintiff has alleged that the Village wanted all homeowners along *both sides* of Tennessee Avenue to grant a 33-foot easement. (Amended Complaint, ¶ 25). The Plaintiff, the Zimmers, and Mr. Brinkman all lived on one side of Tennessee Avenue. (Amended Complaint, ¶ 17). No one from the other side of Tennessee Avenue is alleged to have filed a state court action which caused "ill will" on the part of the Defendants.

Distilled to its finest essence, the Plaintiff's Amended Complaint states that the Plaintiff and her neighbors were all required to grant a 33-foot easement, regardless of whether they had filed a lawsuit against the Village. All homeowners along Tennessee Avenue were treated identically. As such, the Plaintiff could not possibly have been the victim of "sheer malice" or "vindictiveness" on the part of the Defendants.

The Equal Protection Clause cannot be construed as a means by which the Plaintiff may bring her whining before this court. Despite having filed a state court action against the Village, she was treated identically with those individuals who had not. In fact, the Amended Complaint shows that the two-year project was completed (as far as the Plaintiff was concerned) within a year. While the Plaintiff may have remained inconvenienced by her broken well and lack of potable water for longer than she wanted, this does not amount to a constitutional injury. As Judge Posner noted, "[t]he concept of equal protection is trivialized when it is used to subject every decision

made by state or local government to constitutional review by federal courts." *Indiana State Teachers Assn. v. Board of School Comm'rs of the City of Indianapolis*, 1010 F.3d 1179, 1181 (7th Cir. 1996).

Conclusion

For the foregoing reasons, the Defendants request this court to grant their Motion to Dismiss the Plaintiff's Amended Complaint.

Dowd & Dowd, Ltd.

/s/ Jeffrey Edward Kehl
Jeffrey Edward Kehl
One of the Attorneys
for the Defendants

Robert C. Yelton III
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Counsel for the Defendants

Minute Order Form (Rev. 12/90)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
GEORGE M. MAROVICH

Sitting Judge if Other Than Assigned Judge

Case Number 97 C 4935

Date April 13, 1998

Case Title
OLECH -v- VILLAGE OF WILLOWBROOK et al

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

DOCKET ENTRY:

(1) [ ] Filed motion of [use listing in "MOTION" box above].

(2) [ ] Brief in support of motion due _____

(3) [ ] Answer brief to motion due _____
Reply to answer brief due _____

(4) [ ] [ ] Ruling
on _____ set for _____
at _____

[ ] Hearing

(5) [ ] Status hearing
[ ] held [ ] continued to
[ ] set for [ ] re-set for
_____ at _____

(6) [ ] Pretrial conf.
[ ] held [ ] continued to

[ ] set for [ ] re-set for
_____ at _____

(7) [ ] Trial [ ] Set for [ ] re-set for
_____ at _____

(8) [ ] [ ] Bench Trial [ ] Jury Trial
[ ] Hearing
held and continued to _____ at _____

(9) [ ] This case is dismissed
[ ] without [ ] with
prejudice and without costs
[ ] by agreement [ ] pursuant to

[ ] FRCP 4(j) (failure to serve)

[ ] General Rule 21 (want of prosecution)

[ ] FRCP 41(a)(1)

[ ] FRCP 41(a)(2)

(10) [XX] [Other docket entry] Pursuant to Memorandum Opinion and Order entered this day, defendants' motion to dismiss is granted.

(11) [X] [For further detail see
[ ] order on the reverse of
[X] order attached to the original minute order form.]

[ ] No notices required, advised in open court.

[ ] No notices required.

[X] Notices mailed by judge's staff.

[ ] Notified counsel by telephone.

[ ] Docketing to mail notices.

[ ] Mail AO 450 form.

[ ] Copy to judge/magistrate Judge.

[X] courtroom
deputy's
Initials

_____ Date/time received in central Clerk's Office

_____ number of notices

APR 15 1998 date docketed

_____ docketing dpty. initials

13 April 98 date mailed notice

[X] mailing dpty. initials

Document #21

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH, Plaintiff,	)	
v.	)	No. 97 C 4935
VILLAGE OF WILLOWBROOK, et al.,	)	Judge George M. Marovich
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Grace Olech ("Olech") filed this action, pursuant to 42 U.S.C. § 1983, against Defendants the Village of Willowbrook ("Willowbrook" or the "Village"), Gary

Pretzer ("Pretzer"), individually and as President of Willowbrook, and Philip Modaff ("Modaff"), individually and as Director of Public Services for Willowbrook, alleging that Defendants violated her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants have filed a motion to dismiss Olech's Complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the Defendants' motion to dismiss is granted.

BACKGROUND

Olech is the 72-year-old owner and resident of a single-family home on Tennessee Avenue in Willowbrook, Illinois.[1] Olech's home is located between two other homes on Tennessee Avenue – owned by Rodney and Phillis Zimmer (the "Zimmers") on the south and Howard Brinkman ("Brinkman") on the north.

Up until the spring of 1995, Olech and her late-husband obtained their potable water from a private well located on their property. In the spring of 1995, however, the Olechs' well broke down and was allegedly beyond repair. Because the Willowbrook water main extended only to the northern boundary of Brinkman's property – the Olechs' neighbor to the north on Tennessee Avenue – in order to obtain water, the Olechs were forced to hook an overground rubber hose up to the well of the Zimmers – their neighbors to the south on Tennessee Avenue.

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[1] Since the time that the events at issue in this suit took place Olech's husband, Thaddeus Olech, has died of causes unrelated to this action.

The Olechs apparently viewed this as a "temporary solution" to their water problem. As such, the Olechs, the Zimmers and Brinkman allegedly a[illegible]ed Willowbrook to hook their homes up "right away" to the Willowbrook municipal water system. Olech contends that she explained her water problems (the broken well) to Modaff, the Director of Public Services for Willowbrook, and notified him that the overground hose would not work in the winter when the temperature fell below freezing.

Olech contends that after alerting Willowbrook to her problem, the Village began work on extending the water main to hook up Olech's home and the homes of her two neighbors. Willowbrook conditioned its work on an agreement by Olech and her neighbors to each pay one-third of the estimated cost of the project. By July 12, 1995, Willowbrook had received the required payments of $7,012.67 from Olech and her neighbors.

However, in August of 1995, Willowbrook informed Olech and her neighbors that in addition to their cash payments for the project, Willowbrook also required them to grant the Village a 33-foot easement along Tennessee Avenue. According to Olech, the Plat of Easement created by Willowbrook required property owners of both sides of Tennessee Avenue – the Olechs, Zimmers, and Brinkman live on the west side of Tennessee Avenue – to dedicate a 33-foot strip of property along Tennessee Avenue for public roadway purposes. Specifically, Willowbrook wanted to install a paved roadway with sidewalks and public utilities on Tennessee Avenue.

The Olechs and their neighbors refused to grant Willowbrook the 33-foot easement that it required. As a

result of the property owners' refusal to grant the easement, no progress was made on the water project. Finally, on November 10, 1995, Willowbrook's attorney prepared a letter in which the Village withdrew its demand for a 33-foot easement and indicated to Olech and her neighbors that it would proceed with the water main extension if they would grant Willowbrook a 15-foot easement for the water main and the related water service line used to connect the homes. According to Olech's Complaint, the letter from Willowbrook's attorney stated, in part:

> [A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village.

(Compl. at ¶ 26.) Olech and her neighbors agreed to grant Willowbrook the 15-foot easement and the water project was completed approximately four months later on March 19, 1996.

Meanwhile, in November 1995, the overground hose used by the Olechs to connect to their neighbor's well froze. As a result, Olech and her husband were without running water from November 1995 through March 19, 1996.

Olech filed her Complaint with this Court alleging that Willowbrook violated her rights under the Equal Protection Clause by initially requiring that she and her neighbors grant the Village a 33-foot easement while only

requiring a 15-foot easement from other Village residents.[2] Olech contends that the reason that she and her neighbors were singled out by Willowbrook was because they had each filed state-court lawsuits against the Village six years earlier in August of 1989.[3] Olech alleges that these lawsuits made Willowbrook and its officers and employees "look bad." Olech further alleges that these lawsuits generated "substantial ill will" on the part of Willowbrook and its officers and employees. This "ill will," according to Olech, is what ultimately motivated Willowbrook to require a larger easement (33 feet) from her and her neighbors than what is normally required (15 feet) from other property owners in the Village. Olech maintains that the three-month delay, which resulted from Willowbrook's request for the larger easement, is what ultimately caused her and her husband to be without running water during the winter of 1995-1996. Thus, it is this three-month delay that Olech claims deprived her of her rights under the Equal Protection Clause.

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[2] Olech bases this allegation on the letter she received from Willowbrook's attorney reporting that a 15-foot easement was "consistent with Village policy regarding all other property in the Village."

[3] The Olechs, the Zimmers and Brinkman filed three state-court suits against Willowbrook for damage that resulted from the flooding of their property by storm water. The Olechs and Zimmers were successful in their suits against Willowbrook. Brinkman's claims were dismissed for want of prosecution.

DISCUSSION

I. Standards For a Motion to Dismiss

When considering a motion to dismiss, the Court examines the sufficiency of the complaint, not the merits of the lawsuit. *See Triad Assoc. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989). "[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence that supports the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A motion to dismiss will be granted only if the Court finds that the plaintiff can prove no set of facts that would entitle him to relief. *See Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 432 (7th Cir. 1993); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On a motion to dismiss, the Court draws all inferences and resolves all ambiguities in the plaintiffs's favor and assumes that all well-pleaded facts are true. *See Dimmig v. Wahl*, 983 F.2d 86, 86 (7th Cir. 1993).

II. Violation of the Equal Protection Clause

The Seventh Circuit has explained that there are two common varieties of equal protection claims: (1) those in which the plaintiff claims that she is a member of a vulnerable group (principally racial) and has been singled out for unequal treatment on that basis; and (2) those involving challenges to laws or rules that supposedly draw irrational distinctions. *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). A third and more unusual claim involves "orchestrated campaigns of official harassment directed against [a plaintiff] out of sheer malice." *Id.* at 179. Olech contends that her Complaint belongs to this highly unusual class of equal protection claims.

In *Esmail*, a Naperville liquor dealer (Esmail) alleged that he was denied the renewal of his liquor license as a result of an "orchestrated campaign" by the mayor. Specifically, Esmail alleged that the mayor, who is also Naperville's liquor control commissioner, not only denied his repeated applications for a liquor license, but also instituted a "campaign of vengeance" against him which consisted of causing the Naperville police to harass him and his employees with "constant, intrusive surveillance, in causing the police to stop his car repeatedly and forc[ing] him to undergo field sobriety tests, and in causing false criminal charges to be lodged against him." *Id.* at 178. The court summarized that Esmail's "charge here is that a powerful public official picked on a person out of sheer vindictiveness." *Id.*

After reviewing Esmail's 22-page Complaint, the Seventh Circuit declared that:

> If the power of the government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court.

Id. at 179.

While this Court is sympathetic to alleged wrong suffered by Olech and her husband, the Court is not convinced that Olech's Complaint describes the "malignant animosity" or the "orchestrated campaign of official harassment" complained of in *Esmail*. Even accepting Olech's allegations that her state-court action generated "ill will" in Willowbrook against her and her neighbors, this Court is unable to conclude that the Village ever

"harassed" or "picked on" Olech and her neighbors "out of sheer vindictiveness" as in *Esmail*. At most, Olech's Complaint alleges that the Village acted unreasonably and out of "ill will" in requiring her to give up an extra 18 feet of easement space that was not required of other property holders. This hardly qualifies as the same type of conduct alleged to have been suffered in *Esmail*. Moreover, based on the allegations contained in Olech's Complaint, it appears that the reason that the Village wanted 33 feet of easement rather than 15 feet of easement was so that it would be able to install a paved public-roadway along Tennessee Avenue with sidewalks and public utilities – something it apparently could not do without the additional 18 feet of space. (Compl. at ¶ 25.) Nothing in Olech's Complaint – apart from conclusory assertions – indicates that Willowbrook was acting out of vindictiveness or in retaliation for Olech's prior lawsuit. *See Trask v. Rios*, 1995 WL 758410, at *5 (N.D. Ill. Dec. 19, 1995) (" 'Harass,' 'discriminate,' and 'retaliate' are words to which legal significance attaches. Alone, they are legal conclusions that do not place defendants on notice of the circumstances from which the accusations arise and therefore are inappropriate pleading devices."); *Palda v. General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995) ("A complaint [that] consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)."). Assuming that all of the allegations contained in Olech's Complaint are true, it appears to this Court that there may be "ill will" on the part of both Willowbrook and Olech. Nevertheless, this

Court finds that the alleged treatment of Olech by Willowbrook and its officers – as well as the alleged motivation behind this treatment – is not sufficient to state an equal-protection claim under the standards as set forth in *Esmail*.

CONCLUSION

For the foregoing reasons, this Court grants Defendants' motion to dismiss.

ENTER:

/s/ George M. Marovich
GEORGE M. MAROVICH
UNITED STATES DISTRICT COURT

DATE: April 13, 1998

United States District Court
Northern District of Illinois
Eastern Division

OLECH — **JUDGMENT IN A CIVIL CASE**

v. — Case Number: 97 C 4935

VILLAGE OF WILLOWBROOK et al

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED this action is dismissed in its entirety.

Michael W. Dobbins,
Clerk of Court

/s/ J. Smith
J. Smith, Deputy Clerk

Date: 4/13/98

NO. 98-2235

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GRACE OLECH, Plaintiff-Appellant, vs. VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant, VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant, VILLAGE OF WILLOWBROOK, Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Gen. No. 97 C 4935 Honorable George M. Marovich Judge Presiding

BRIEF OF THE DEFENDANTS-APPELLEES

NORTON, MANCINI, ARGENTATI,
WEILER & DeANO
109 North Hale Street, P.O. Box 846
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Attorney for Defendants-Appellees

Of Counsel:

James L. DeAno

DEFENDANTS-APPELLEES'

CERTIFICATE OF INTEREST

(Received Jun. 12, 1998)

Appellate Court No: 98-2235

Short Caption: OLECH v. VILLAGE OF WILLOWBROOK, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.

(1) The full name of every party or amicus the attorney represents in the case:
VILLAGE OF WILLOWBROOK, an Illinois municipal corporation; GARY PRETZER, individually and as President of Defendant, VILLAGE OF WILLOWBROOK; and PHILIP J. MODAFF, individually and as Director of Public Services for the Defendant, VILLAGE OF WILLOWBROOK

(2) If such party or amicus is a corporation:

i) Its parent corporation, if any; and
None

ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:
None

(3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

NORTON, MANCINI, ARGENTATI, WEILER & DeANO, 109 North Hale, P.O. Box 846, Wheaton, Illinois 60187 and 111 West Washington Street, Suite 835, Chicago, Illinois and Dowd & Dowd, Ltd., 55 West Wacker Drive, Suite 1000, Chicago, Illinois 60601

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in from [sic] of the table of contents of the party's main brief.

Attorney's Signature: /s/ James L. DeAno

Date: 6/11/98

Attorney's Printed Name: James L. DeAno
Norton, Mancini, Argentati, Weiler & DeAno

Address: 109 North Hale, P.O. Box 846
Wheaton, Illinois 60189-0846

Phone Number: 630/668-9440

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with the type volume limitation of Circuit Rule 32(d)(2), contains 65,012 characters, and is formatted for WordPerfect 5.1 for DOS.

/s/ James L. DeAno
James L. DeAno
Attorney for
Defendants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

The Appellees are satisfied that the jurisdictional statement submitted by the Appellant is complete and correct.

STATEMENT OF THE CASE

1. Nature of the Case

This is an equal protection action brought by Plaintiff to recover for damages sustained as a result of a three-month delay in a project that connected the municipal water supply to her home. The Plaintiff has alleged that the Defendants delayed the water project because of Plaintiff's participation as a plaintiff in a separate lawsuit against the Village. The Plaintiff attempted to bring the cause of action pursuant to principles set forth by this Court in the case of *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), alleging that defendants violated the equal protection clause by singling her out as the object of their animosity.

II. Course of Proceedings and Disposition Below

Plaintiff's original Complaint was dismissed and Defendants' Motion to Dismiss the First Amended Complaint was granted on April 13, 1998. Plaintiff filed a Notice of Appeal on May 13, 1998.

III. Statement of Facts

The following facts are taken from the allegations of Plaintiff's First Amended Complaint. In the spring of

1995, the Defendant Village of Willowbrook developed a plan to require all homeowners along Tennessee Avenue to be connected to the municipal water supply system and the plan was to be implemented by the Spring of 1997. (Doc. 8, par. 18) The Plaintiff resided in the Village of Willowbrook along Tennessee Avenue which was a nondedicated and unimproved road. (Doc. 8, par. 22) In the Spring of 1995, Plaintiff's well broke down and in May of 1995 Plaintiff requested that the Village connect her home to the municipal water system "right away." (Doc. 8, pars. 15, 19) As part of the water extension project, the Village desired to dedicate Tennessee Avenue and improve it with pavement, sidewalks and public utilities. (Doc. 8, par. 25) To fully improve the road, the Village requested from the Plaintiff in August and September, 1995, a thirty-three-foot easement on land owned by Plaintiff abutting Tennessee Avenue. (Doc. 8, pars. 23, 25) The Plaintiff objected to providing a thirty-three-foot easement and in November of 1995, the Village agreed to require a fifteen-foot easement and a temporary construction easement of an additional five feet for the water extension project. (Doc. 8, par. 26) The project was completed and water was delivered to Plaintiff's home in March of 1996, a full year ahead of its projected Spring, 1997, completion date. (Doc. 8, pars. 17, 34)

The Plaintiff's Amended Complaint does not allege that any other Village residents who lived adjacent to non-dedicated unimproved roads were not asked for thirty-three-foot easements to improve the roads as a condition of the delivery of public water. Nor does the Amended Complaint allege that Tennessee Avenue was

ultimately dedicated or improved as part of the water connection project.

IV. Allegations of Amended Complaint

Defendants agree that Plaintiff's "recitation of facts" accurately sets forth the allegations of Plaintiff's First Amended Complaint. As set forth more fully in Defendants' argument, however, Defendants disagree with the legal and factual conclusions set forth in the Plaintiff's First Amended Complaint.

SUMMARY OF ARGUMENT

The Plaintiff's First Amended Complaint fails to state a cause of action for a violation of equal protection under the principles set out in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). The Complaint fails to allege actions by the Defendants that amount to the type of orchestrated campaign of official harassment found in *Esmail*. At worst, Defendants' conduct delayed the delivery of municipal water to Plaintiff's home by approximately three months. In addition, Defendants' actions were motivated by the legitimate government objective of fully improving the road adjacent to Plaintiff's home with pavement, sidewalks and public utilities. *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, 101 F.3d 1179 (7th Cir. 1996); and *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992). Moreover, the Plaintiff's initial deprivation of water was attributable to the break down of her well, not to any conduct on the part of the Defendants. Even the subsequent three-month delay in the project would not have

deprived Plaintiff of water had her alternative source of water not failed. Again, the failure of the alternative water source cannot be attributed to the conduct of the Defendants.

Finally, Plaintiff has failed to allege that others similarly situated were treated any differently than she. *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992); *Garcia v. State of New Mexico Office of the Treasurer*, (D.N.M. 1997) 959 F.Supp. 1426.

ARGUMENT

I. Plaintiff's First Amended Complaint Fails to State a Cause of Action Under Principles Set Forth in the Case of *Esmail v. Macrane*

Plaintiff has attempted to state a cause of action for a violation of equal protection based upon principles set out by this Court in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). This cause of action stems from the equal protection clause's "last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives." 53 F.3d *at* 180. It is rooted in governmental conduct that is malicious, unrelenting, motivated by "malignant animosity," and "wholly unrelated to a legitimate public objective." *Esmail v. Macrane*, 53 F.3d 176, 179-80 (7th Cir. 1995); *Sarantakis v. Village of Winthrop Harbor*, (N.D.Ill. 1997) 969 F.Supp. 1095 (plaintiff must demonstrate malice on the part of the governmental entity). The standard for governmental conduct established by Esmail requires proof of an orchestrated campaign of official harassment aimed at doing significant

injury to a harmless plaintiff. Plaintiff's burden, according to *Esmail*, is to prove that the defendants' actions reflected a spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective.

The necessary components of the cause of action can be gleaned from the following statements in *Esmail*:

> In particular, *Esmail* is not complaining merely that equally or more guilty liquor licensees than he are treated more leniently. He is complaining about an **orchestrated campaign of official harassment** directed against him out of sheer malice. 53 F.3d 176 *at* 179 (emphasis added).
>
> • • •
>
> What it (the equal protection clause) does require, and what *Esmail* may or may not be able to prove, is that the action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons **wholly unrelated to any legitimate state objective.** 53 F.3d *at* 180 (emphasis added).
>
> • • •
>
> If the power of government is brought to bear on a **harmless individual** merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court. 53 F.3d *at* 179 (emphasis added).

Thus, the cause of action requires (1) an orchestrated campaign of official harassment (2) directed at a "harmless" individual and (3) wholly unrelated to any legitimate state objective.

A. Plaintiff's Allegations Do Not Demonstrate an Orchestrated Campaign of Official Harassment

In *Esmail,* the "orchestrated campaign of official harassment directed against [plaintiff] out of sheer malice" was characterized as a "campaign of vengeance." This campaign included attempts to deny the plaintiff his liquor license as well as efforts to harass plaintiff and his employees with constant intrusive surveillance, repeated police stops during which the plaintiff was forced to undergo field sobriety tests and in the filing of false criminal charges against plaintiff. 53 F.3d *at* 178.

In this case, however, rather than demonstrating that Defendants attempted to "get" the Plaintiff, the Amended Complaint reveals that Defendants initially, and for a short time, sought an easement of sufficient width to improve a roadway with pavement, sidewalks and public utilities. Such improvements would benefit residents, including the Plaintiff, much more than they would benefit the government. Plaintiff, apparently not desirous of such improvements, objected to the thirty-three-foot easement, but ultimately agreed to a fifteen-foot easement, and another five-foot temporary construction easement. Defendants' conduct in this regard was hardly an orchestrated campaign of harassment, or an effort to "get" the Plaintiff, but merely a legitimate effort to improve a road obviously used by the Plaintiff with great frequency. *Esmail* is distinguishable in that the defendant there had no such public improvement or purpose in mind when attempting to deprive the plaintiff of his business license.

The Village's lack of malice and intent to harass is evidenced by the fact that it abandoned its initial request

within three months and agreed to a permanent easement of fifteen feet and a temporary easement of five feet and completed the water extension project within nine months of Plaintiff's request and a full year before the project was projected to be implemented. The initial thirty-three-foot easement request was part of a legitimate attempt to improve Tennessee Avenue and therefore cannot amount to a denial of equal protection. In *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis,* 101 F.3d 1179 (7th Cir. 1996), the court reasoned that even though a class can consist of a single member, the plaintiff must still demonstrate the defendant's conduct to be irrational and arbitrary.

At worst, Plaintiff's allegations show that the Plaintiff was a random victim of governmental error; the Village initially asked the Plaintiff for a thirty-three-foot easement, but later obtained advice from counsel that a total of twenty feet of easement would suffice. (Doc. 8, par. 26). A claim for violation of equal protection will not lie where the governmental action was taken out of error, neglect or mistake. *Ciechon v. City of Chicago,* 686 F.2d 511, 523 (7th Cir. 1982); *Snowden v. Hughes,* 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497. Although a plaintiff can be a member of a class of limited membership, the plaintiff must have been singled out because of his membership in that class and not be just the random victim of governmental incompetence. *Albright v. Oliver,* 975 F.2d 343, 348 (7th Cir. 1992), aff'd 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). To give rise to a constitutional grievance, the government conduct must be rooted in design and not derived merely from error or fallible judgment.

Hamlyn v. Rock Island County Metropolitan Mass Transit District, (C.D.Ill. 1997) 986 F.Supp. 1126, 1133.

B. Defendants' Actions Were Related to a Legitimate State Objective

This court explained in *Esmail* that the equal protection clause does not require government to treat all identically-situated individuals identically, but prohibits unequal treatment which is solely the result of vindictiveness. Thus, unequal treatment does not necessarily violate the equal protection clause, except when the distinctive treatment has no rational relation to a legitimate government interest. *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, 101 F.3d 1179, 1182 (7th Cir. 1996) (unequal treatment of similar persons does not offend the equal protection clause where a rational basis for the government action exists).

Plaintiff claims that the Defendants created a class of one by singling her out for disparate treatment. Where the government is alleged to have made such a "classification," it is entitled to a presumption that its classification is rational and constitutional. *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992). To overcome this presumption of rationality, the plaintiff must establish in his complaint that the facts which formed the basis of the classification could not reasonably be conceived to be true by the governmental decision-maker. *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992). Where a rational basis for the government conduct

emerges from the allegations of the complaint, the complaint cannot survive a motion to dismiss. *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992).

Here, the allegations of Plaintiff's Amended Complaint reveal there to be a rational basis for Defendants' conduct. The desire to extend and improve the infrastructure of the road in conjunction with the installation of the water delivery system was certainly a legitimate government objective. In *Esmail*, the sole objective was to deprive the plaintiff of his license. Here, it is clear that it was not the government's sole objective to deprive Plaintiff of water. The Plaintiff did receive the water, albeit not "right away." The delay in completing the water delivery system was attributable to legitimate government efforts to improve the road with pavement, sidewalks and public utilities in conjunction with the water extension project.

Though Plaintiff attempts to draw the inference that her alleged unequal treatment was due to her status as a claimant against the Village in another lawsuit, that conclusion does not logically follow from the allegations of the Amended Complaint. The Amended Complaint pleads a rational basis for Defendants' conduct; the desire to improve a street used by the Plaintiff in conjunction with the installation of a water main under that street. *Esmail* recognizes that the state's act of singling out an individual for differential treatment does not itself give rise to the cause of action. It is the malicious and spiteful motivation that forms the basis of the cause of action. Even if such improper motivation is alleged, the cause of action does not survive a motion to dismiss where, as here, a legitimate motivation for the governmental action exists.

C. Plaintiff's Loss Was Not Caused Solely by Defendants' Conduct

In *Esmail,* the court found it significant that plaintiff's loss was brought on by the defendant's conduct alone. The court characterized the plaintiff as a "harmless individual" whose treatment was "the result solely of a vindictive campaign by the mayor." 53 F. 3d *at* 179. In *Indiana State Teachers Association,* the court followed this reasoning, noting that the plaintiff must be "hapless." 101 F.3d *at* 1082. Here, however, the Plaintiff cannot be said to be "harmless" or "hapless" with respect to her lack of water. Plaintiff approached the Village with her request for water only after her independent source of water failed her. It is not apparent from the Amended Complaint that Plaintiff exhausted all reasonable attempts to repair her well or devise a new method of water delivery from her neighbor. Thus, irrespective of any attempts by the Village to acquire sufficient land to properly improve the road, Plaintiff cannot claim that her loss of water was due solely to the conduct of the Village. Plaintiff's deprivation of running water was merely incidental to the entire process and can hardly be deemed the objective of the Village. Plaintiff's Amended Complaint admits that the plan to connect the homeowners on Tennessee Avenue to the municipal water supply system was developed in the Spring of 1995 and was to be implemented within two years, or by the Spring of 1997. (Doc. 8, par. 18). Yet, Plaintiff admits that she received water when the project was completed on or about March 19, 1996, a full year ahead of schedule. (Doc. 8, par. 34).

There is no suggestion in Plaintiff's Amended Complaint that the project was intended to be or could have been completed by November of 1995 when Plaintiff's hose froze. Plaintiff cites no law, custom, practice or precedent to suggest that the project should, would or could have provided public water service to the Plaintiff by November of 1995, even if the thirty-three-foot easement had never been sought. Nor is the provision of governmental services or aid a constitutionally-protected affirmative right. *Sarantakis v. Village of Winthrop Harbor,* (N.D.Ill. 1997) 969 F.Supp. 1095, 1105. Indeed, the constitution confers no affirmative right to governmental aid or services, even where such may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual. *See Sarantakis v. Village of Winthrop Harbor,* (N.D.Ill. 1997) 969 F.Supp. 1095 *at* 1105.

Sarantakis is also noteworthy because it, like the instant case, involved the denial of governmental services, as opposed to the refusal of a business license at issue in *Esmail. Sarantakis* holds that where the claim involves the denial of governmental services, the equal protection claim must be based upon discrimination directed at groups, rather than individuals. 969 F.Supp *at* 1105. It is submitted by Defendants that *Sarantakis,* rather than *Esmail,* controls this case and Plaintiff's alleged "classification of one" does not state a claim for equal protection. Indeed, the *Esmail* doctrine has not been accepted at all in the Fourth or Sixth Circuits. *Edwards v. City of Goldsboro,* (E.D.N.C. 1997) 981 F.Supp. 406, 410; *Futernick v. Sumpter Township,* 78 F.3d 1051 (6th Cir. 1996);

and *Dubuc v. Green Oak Township,* 958 F.Supp. 1231, 1236-37 (E.D.Mich. 1997).

II. Plaintiff Has Not Alleged That Similarly-Situated Individuals Were Treated Differently

This third kind of equal protection claim, recognized by *Esmail,* must still be supported by factual allegations that similarly-situated individuals were treated differently. *Esmail* noted that the "distinctive feature" of this type of claim was that plaintiff's **unequal treatment** was alleged to have been the result solely of a vindictive campaign by the mayor. 53 F.3d *at* 179 (emphasis added). The plaintiff in *Esmail* alleged that other liquor license applicants were not subjected to the same harassment as he.

In *Wroblewski v. City of Washburn,* 965 F.2d 452 (7th Cir. 1992), the plaintiff alleged that he was singled out by the defendant city for unfair treatment with respect to the operation of his business, a marina. In dismissing the equal protection claim, the court noted that even though the plaintiff alleged that he was singled out for this unfair treatment, he failed to identify any individual or group situated similarly to himself. The lack of such an allegation was deemed fatal to the equal protection claim and its dismissal was affirmed. 965 F.2d 452, 459.

In *Garcia v. State of New Mexico Office of the Treasurer,* (D.N.M. 1997) 959 F.Supp. 1426, a public employee alleged that the defendant violated the equal protection clause in terminating him for allegedly soliciting a bribe. The district court dismissed the claim, noting that even

when malignant animosity motivated governmental officials to bring to bear the power of government on a harmless individual, the plaintiff must allege that similarly-situated individuals were treated differently. 959 F.Supp. *at* 1432-33. This requirement is satisfied, the court noted, only where the plaintiff supports the complaint with well-pleaded facts demonstrating the differential treatment of similar individuals. 959 F.Supp. *at* 1434. The court noted that although the plaintiff therein stated that he was treated in a "manner disparate" from other employees, such conclusory allegations were insufficient to state a claim upon which relief could be granted. The plaintiff's complaint was dismissed because he failed to allege that other employees who had been accused of bribery or some similarly serious charge were not discharged.

In *O'Connor v. Chicago Transit Authority,* 985 F.2d 1362 (7th Cir. 1993), an employee of the Chicago Transit Authority with a record of insubordination brought an equal protection claim asserting that his termination resulted from his whistle-blowing activity. Summary judgment for the defendant was affirmed, with the court noting that the plaintiff failed to demonstrate that another grossly insubordinate worker was treated differently than he.

In *Gaylor v. Thompson,* (W.D. Wis. 1996) 939 F.Supp. 1363, the plaintiffs applied for a display permit and alleged that they were denied equal protection because the governor directly engaged himself in the process, as he had done in no other case, and denied plaintiffs' application because of their views on the separation of church and state. Plaintiffs' failure to demonstrate how

they were similarly situated to previous applicants or that they were the only ones treated differently than previous applicants resulted in dismissal of their claim.

Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982), is distinguishable because the plaintiff therein could identify a similarly-situated person who was treated differently by the defendant. The plaintiff was a female paramedic who was discharged by her employer because of her alleged failure to render proper treatment during an ambulance transport of a patient. The plaintiff's co-worker, a male, was not disciplined, though he was equally responsible for the negligent treatment of the patient in question.

In *Ziegler v. Jackson*, 638 F.2d 776 (5th Cir. 1981), cited by *Esmail*, the governmental entity deprived the plaintiff of employment because of his convictions for presenting a fire arm and criminal provocation, while it retained other public employees convicted of similar offenses. The plaintiff therein could point to persons and circumstances identical to his own wherein the treatment was different.

Plaintiff's residence adjacent to a non-dedicated road is a unique fact that contradicts any claim that others who sought connection to the public water supply were similarly situated. The Amended Complaint alleges that Plaintiff requested a connection to the public water supply "right away" after her well broke down. (Doc. 8, par. 19). The Plaintiff does not allege that any other residents who lived adjacent to such non-dedicated roads received public water "right away" after making a request or that the Village did not initially attempt to obtain easements of sufficient width to improve the road with pavement,

sidewalks and public utilities as part of the water connection project. The Amended Complaint does not allege that the law required that Plaintiff's home be connected to the public water supply "right away" or that every other resident that ever made a request for public water service received that water "right away" or within three months or six months or nine months.

The Plaintiff alleges that Defendants' request for a thirty-three-foot easement was made in August and again in September, but that by November 10, 1995, the Village agreed that a fifteen-foot easement along with a five-foot temporary construction easement would suffice for the installation of the water main. The portion of the Village Attorney's letter cited in paragraph 26 of Plaintiff's Amended Complaint is vague and does not suggest that Plaintiff was treated any differently than similarly-situated residents. The letter states that the requirement of a fifteen-foot easement and a five-foot temporary construction easement was consistent with Village policy regarding "all **other** property" (emphasis added); this does not mean that other residents who lived adjacent to non-dedicated roads over which the governmental body had no easement were granted a water connection without a request for a thirty-three-foot easement. Rather, the language cited by the Plaintiff is more reasonably construed to mean that with respect to property "other" than Plaintiff's, i.e., where the residents seeking water were living adjacent to a dedicated and fully improved road, fifteen-foot permanent and five-foot construction easements were sought by the Village.

III. Defendants' Conduct Was Not the Cause of Plaintiff's Injury

Because this action is brought pursuant to §1983, the Plaintiff is obligated to show that her injury would not have occurred but for Defendants' conduct. As the court noted in *Button v. Harden*, 814 F.2d 382, 383 (7th Cir. 1987):

> Section 1983 is a tort statute. To prevail under it, a plaintiff must show not only that his federal rights were violated but also that, had it not been for the violation, the injury of which he complains would not have occurred. *Citing Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471 (1977); *DeShaney v. Winnebago County Department of Social Services*, 812 F.2d 298, 302 (7th Cir. 1987).

This case can easily be distinguished from *Esmail* when focus is placed upon the ultimate cause of the Plaintiff's injury or deprivation. In *Esmail*, the defendant was solely responsible for the alleged harassment of plaintiff by police and the loss of his license to do business. Here, the loss or injury occurred before the Defendants had any opportunity to act. It was the Plaintiff who approached the Defendants after her well broke down and then complained when the Defendants did not act quickly enough to provide her with a new source of water. Thus, Defendants' conduct did not cause Plaintiff's loss of water.

CONCLUSION

Plaintiff is asking this Court to scrutinize a decision to initially seek a thirty-three-foot easement for the improvement of a non-dedicated road as part of a project for the installation of a water main. Plaintiff's Amended Complaint supplies facts which demonstrate that this request was neither arbitrary nor irrational, and also fails to allege that similar requests for thirty-three-foot easements were not made when other residents requested the installation of a water main along a non-dedicated road. Moreover, the Plaintiff's loss of water was the result of her well breaking down and a hose freezing, not the result of governmental conduct. The extension of the principles which govern the *Esmail* decision to the facts set forth in Plaintiff's Amended Complaint herein would trivialize the equal protection clause. *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996) (the concept of equal protection is trivialized when it is used to subject every decision made by a local government to constitutional review by federal courts).

WHEREFORE, in light of the foregoing, Defendants pray that this Court will enter its Order affirming the Order of the district court dismissing Plaintiff's First Amended Complaint with prejudice.

Respectfully submitted,

NORTON, MANCINI,
ARGENTATI, WEILER & DeANO

By: /s/ James L. DeAno
James L. DeAno
Attorney for
Defendants-Appellees

NO. 98-2235

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

GRACE OLECH, Plaintiff-Appellant, -vs- VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, Defendants-Appellees.	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 97 C 4935 Hon. George M. Marovich, Judge Presiding.

REPLY BRIEF OF
PLAINTIFF-APPELLANT GRACE OLECH

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AND OTHER AUTHORITIES

STATEMENT OF FACTS

The Statement Of The Case portion of the brief filed on behalf of Willowbrook and its officials (hereinafter sometimes referred to collectively as "Willowbrook") is misleading insofar as it implies that the plan developed by Willowbrook by the spring of 1995, which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to the municipal water system of Willowbrook, to hook up to the system, contemplated a dedication of Tennessee Avenue, and insofar as it implies that the homes of Howard Brinkman, Grace Olech, and the Zimmers were hooked up pursuant to that plan. (Willowbrook's brief, p. 6.) The only reference to Willowbrook's plan in the Amended Complaint is in paragraph 18 where it is alleged that by the spring of 1995 Willowbrook had developed a plan, which was to be implemented within two years of the spring of 1995, and which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to the municipal water supply system, to hook up to the system. (Appendix 6.) This allegation explains why the Olechs did not drill a new well when, in the spring of 1995, their well broke down and was beyond repair because they were going to have to hook up within two years anyway. But the Amended Complaint does not allege that Willowbrook's plan contemplated a dedicated street, or that the homes of Brinkman, Olech, and the Zimmers were hooked up pursuant to Willowbrook's plan. (In fact, if Willowbrook's plan had included dedication of the street, it would have required Willowbrook to pay the property owners for the easement rights involved because private property may not be taken for public purposes without

just compensation. (United States constitution, amendment 5.) The issue of a street dedication did not come up until shortly after Howard Brinkman, Grace Olech, and the Zimmers, the plaintiffs in the state court lawsuit, notified Willowbrook of the Olechs' problem and requested that their homes be hooked up right away. (Appendix 6-7) In its brief Willowbrook refers to "[t]he project['s] . . . projected Spring, 1997, completion date." As noted above, the homes of Brinkman, Olech, and the Zimmers were not hooked up pursuant to Willowbrook's plan. Brinkman, the Olechs, and the Zimmers requested the extension of the water main right away in the spring of 1995, and the homeowners, themselves, paid for the project. (Appendix 6-7) There was never any projected spring 1997 completion date for the project that Brinkman, the Olechs, and the Zimmers paid for.

Finally, it should be noted that Willowbrook incorrectly stated that "Plaintiff's original Complaint was dismissed." (Willowbrook's brief, p. 5.) That statement is not true. Mrs. Olech elected to file an Amended Complaint rather that [sic] to brief the motion to dismiss the original Complaint. (Doc. 7)

ARGUMENT

The District Court erred in dismissing Grace Olech's Amended Complaint because the Amended Complaint states a claim under 42 U.S.C §1983 for violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution under the principles of this Court's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), and because the plaintiff has not "pled herself out of an action" by alleging that other homeowners were asked to grant a 33-foot easement.

In her initial brief, Grace Olech maintained that her Amended Complaint properly set forth a claim under 42 U.S.C. §1983 for violation of her rights under the Equal Protection Clause pursuant to this Court's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). Mrs. Olech maintained that she was required to plead unequal treatment resulting from vindictiveness, animosity, or other improper purpose of the governmental officials involved, and that her Amended Complaint set forth those elements.

In response, Willowbrook first argues that the Amended Complaint is insufficient because it does "[n]ot [d]emonstrate an [o]rchestrated [c]ampaign of [o]fficial [h]arassment." (Willowbrook's brief, pp. 10-12.) Grace Olech explained in her original brief why it is not necessary to plead "an orchestrated campaign of official harassment" as long as the complaint alleges unequal treatment resulting from vindictiveness, animosity, or other improper purpose of the governmental officials involved (Olech's brief, pp. 19-20), and that discussion

will not be repeated here. Several remarks made by Willowbrook in connection with its discussion of the concept of "an orchestrated campaign of official harassment" should, however, be addressed.

Willowbrook has stated as follows:

> " . . . Defendants initially, and for a short time, sought an easement of sufficient width to improve a roadway with pavement, sidewalks and public utilities. Such improvements would benefit residents, including the Plaintiff, much more than they would benefit the government."
>
> (Willowbrook's brief, p. 10.)

Willowbrook has included this language in an attempt to convince this Court that it was not trying to "get" Mrs. Olech, but that it was trying to "benefit" her. It is not a "benefit" to a property owner, however, for the government to take property from him, for a road or other public purpose, without paying him just compensation for it (see United States constitution, amendment 5), nor is it a "benefit" to a property owner for the government to demand property rights from him as a condition of receiving running water, which the government does not demand of others as a condition of receiving running water. It is especially not a "benefit" to a property owner for the government to attempt to obtain property rights from him in this way because of ill will generated by litigation and in an attempt by the government "to control stormwater drainage in the vicinity to the detriment" of the property owner "by the use of ditches and swales" as alleged in the Amended Complaint. (Appendix 8) Willowbrook's argument that it was trying to "benefit" Mrs. Olech is contradicted by the allegations of the Amended

Complaint which must, of course, be accepted as true at this stage of the proceedings. *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

Willowbrook also stated that "[t]he Village's lack of malice and intent to harass is evidenced by the fact that it abandoned its initial request within three months." (Willowbrook's brief, p. 11.) Willowbrook's statement in this regard might be a good closing argument for its lawyer to make to the jury, but it has no place in connection with a motion to dismiss under Rule 12(b)(6). The Amended Complaint alleges that Willowbrook treated Brinkman, the Olechs, and the Zimmers differently from other property owners in the village "because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue." (Appendix 8) This allegation must be accepted as true, and Willowbrook cannot argue in connection with a Rule 12(b)(6) motion that there is evidence that it is not true. In any event, the fact that Willowbrook ultimately relented when it was threatened with legal action does not evidence a lack of malice or intent to harass.

Willowbrook has also stated that it completed the water extension project "a full year before the project was projected to be implemented." (Willowbrook's brief, p. 11.) This statement is incorrect as explained in the Statement Of Facts portion of this reply brief.

Willowbrook has also stated that, "[a]t worst, Plaintiff's allegations show that the Plaintiff was a random

victim of governmental error," and that the government's conduct was not "rooted in design." (Willowbrook's brief, pp. 11-12.) Again, this argument by Willowbrook is contradicted by the allegations of the Amended Complaint to the effect that Willowbrook's actions were "rooted in design" (Par. 27), and this argument is not a proper one to make in connection with a Rule 12(b)(6) motion to dismiss.

Willowbrook's second argument is that the Amended Complaint is insufficient because "[d]efendant's [a]ctions [w]ere [r]elated to a [l]egitimate [s]tate [o]bjective." (Willowbrook's brief, p. 12-13.) Willowbrook has waived this argument. Willowbrook's Motion To Dismiss Plaintiff's Amended Complaint (Appendix 12-13) incorporated by reference a Memorandum Of Law In Support Of Motion To Dismiss. (Appendix 14-22) In the motion and memorandum, Willowbrook presented only two arguments in support of its request for dismissal under Rule 12(b)(6). First, Willowbrook argued that the Amended Complaint did not allege a violation of the Equal Protection Clause pursuant to this Court's decision in *Esmail v. Macrane*, 53 F.2d 176 (7th Cir. 1995), because the Amended Complaint "[l]acks [s]ufficient [a]llegations of [m]alice on the [p]art of the [d]efendants." (Appendix 20-21) Willowbrook also argued that Mrs. Olech had "[p]led [h]erself [o]ut of an [a]ction [b]y [a]lleging that [o]ther [h]omeowners [w]ere [a]sked to [g]rant a 33-foot [e]asement." (Appendix 21-22) Willowbrook did not argue that the Amended Complaint was insufficient because defendant's actions were related to a legitimate state objective. Willowbrook cannot raise this contention for the first time on appeal (see *Coulter v. Vitale*, 882 F.2d 1286, 1289 (7th Cir. 1989)), especially

where, as here, if the argument had merit and had been properly raised, Mrs. Olech could have sought to amend her complaint to correct any related defect.

Even if Willowbrook had not waived this argument, it would have been unavailing to Willowbrook. The allegations of the Amended Complaint set forth Willowbrook's objective or motivation for its conduct, and that objective was not legitimate. It is not a legitimate government objective to take property from its owner without paying for it (United States constitution, amendment 5), nor, as a result of ill will, to demand property rights from him as a condition of receiving running water, which the government does not demand of others as a condition of receiving running water. Nor is it a legitimate government objective to attempt to extort property rights from a homeowner, who has sued the government for flooding his property with stormwater, in an attempt by the government to use those property rights to control stormwater in the vicinity of the homeowner to his detriment by the use of ditches and swales as alleged in the Amended Complaint. (Par. 27) (See *Esmail*.) Willowbrook's argument in this regard is simply another attempt to contradict the allegations of the Amended Complaint which, as noted above, is inappropriate at this stage of the proceedings. In *Esmail*, the government could have argued that it had a legitimate state objective in denying the plaintiff's liquor license applications, *i.e.*, to protect the public from liquor dealers who had violated the law. Such an argument would have been unavailing there in light of the allegations of the complaint, and it is equally unavailing here. The case of *Wroblewski v. City of Washburn*, 965 F.2d 452 (7th Cir.

1992), cited by Willowbrook, is readily distinguishable. In that case the facts alleged in the plaintiff's complaint, itself, established that the government had a rational and legitimate basis for its conduct, *i.e.*, to "no longer do business with someone with whom it had been associated in a losing financial arrangement." (965 F.2d 452, 460.) In the case under review, as in *Esmail* (53 F.3d 176, 179), the complaint establishes that the government's objective was not legitimate.

Willowbrook's next argument is that "[p]laintiff's [l]oss [w]as [n]ot [c]aused [s]oley by [d]efendant's [c]onduct." (Willowbrook's brief, p. 14-15.) Actually, Willowbrook has argued causation twice, in its argument IC and its argument III. Willowbrook has waived this argument as well because it did not appear in Willowbrook's Motion To Dismiss Plaintiff's Amended Complaint (Appendix 12-13) or Willowbrook's Memorandum Of Law In Support Of Motion To Dismiss (Appendix 14-22). This argument is in the record on appeal, but it first appears in the Reply filed by Willowbrook in support of its motion to dismiss the Amended Complaint. (Doc. 18, pp. 4-6) Arguments in support of a motion to dismiss not raised in the district court until the reply are deemed waived. *(Lockrey v. Leavitt Tube Employees' Profit Sharing Plan*, 748 F.Supp. 662, 667 (N.D.Ill. 1990).) And a party cannot raise an issue on appeal unless it is raised in a meaningful way below. *Coulter v. Vitale*, 882 F.2d 1286, 1289 (7th Cir. 1989).

Even if this argument had not been waived, it would not be of any help to Willowbrook. The Amended Complaint alleged that Willowbrook's illegal demands were the cause of Mrs. Olech's injury. The Amended Complaint

alleged that from the time Modaff first demanded the 33-foot easements in August of 1995 until Willowbrook withdrew its illegal demands on November 10, 1995, no progress was made on the project (Appendix 9), and that the initial refusal of the defendants to proceed with the project unless Willowbrook was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, "a delay which proved critical as a result of the approaching winter weather." (Appendix 9) The Amended Complaint alleges that in November of 1995, the overground hose used by the Olechs to connect to their neighbors' well froze, and, therefore, the Olechs were without running water from November of 1995 until the project was conpleted [sic] on March 19, 1996. (Appendix 9-10) Finally, the Amended Complaint alleged that the Olechs were without running water during the winter of 1995-1996 and suffered great inconvenience, humiliation, and mental and physical distress "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication." (Appendix 10) These allegations must be accepted as true in connection with the Rule 12(b)(6) motion. Clearly, the Amended Complaint adequately set [sic] forth causation.

In its brief, Willowbrook stated that "[i]t is not apparent from the Amended Complaint that Plaintiff exhausted all reasonable attempts to repair her well or devise a new method of water delivery from her neighbor." (Willowbrook's brief, p. 14.) This argument is specious. The Amended Complaint alleged that the well was broken

down and "was beyond repair" (Appendix 5), that the Olechs were going to be required by Willowbrook to hook up to the municipal water system by 1997 (Appendix 6), and that the method of water delivery from the neighbor was inadequate in the winter. (Appendix 6, 9-10) In fact, the Amended Complaint alleged that in May of 1995 Modaff was informed that the Olechs' temporary solution of the problem would not work in the winter when temperatures fell below freezing. (Appendix 6) Willowbrook again stated in connection with its argument on causation that the project was completed "a full year ahead of schedule." This statement is inaccurate for the reasons set forth in the Statement Of Facts herein. The case of *Sarantakis v. Village of Winthrop Harbor,* 969 F.Supp. 1095 (N.D.Ill. 1997), cited by Willowbrook in connection with its argument on causation, is of no help to Willowbrook. First, *Sarantakis* involved a motion for summary judgment, not a motion to dismiss under Rule 12(b)(6). Second, *Sarantakis* distinguished *Esmail* on the basis that the plaintiff had "not shown that defendant Commons acted with such malice as to violate any equal protection right," and not on the basis that *Esmail* does not apply in the context of government services. (969 F.Supp. 1095, 1105.) Finally, the case cited by *Sarantakis* for the proposition that discrimination based on individual, rather that [sic] group, reasons is insufficient, *New Burnham Prairie Homes, Inc. v. Village of Burnham,* 910 F.2d 1474 (7th Cir. 1990), involved, not the provision of government services, but the denial of building permits, which is analogous to the denial of liquor licenses in *Esmail.* There is no support for Willowbrook's argument that the type of equal protection

claim recognized in *Esmail* is restricted to unequal treatment in the denial of licenses or permits as opposed to unequal treatment in the provision of essential government services. And, as noted above, Willowbrook did not make this argument in its motion to dismiss in any case.

Willowbrook's final argument is that "[p]laintiff [h]as [n]ot [a]lleged [t]hat [s]imilarly-[s]ituated [i]ndividuals [w]ere [t]reated [d]ifferently" because, Willowbrook argues, the plaintiff resides on a non-dedicated street. (Willowbrook's brief, p. 15.) Willowbrook waived this argument by failing to raise it in the district court until its Reply. The waiver rule is especially appropriate with respect to this argument because, if the argument were valid and Willowbrook had raised it in connection with its motion to dismiss, Mrs. Olech could have sought to amend her complaint to correct any related defect.

In any event, Willowbrook's argument in this regard is unavailing to Willowbrook. The Amended Complaint alleges that Village Attorney admitted in a letter dated November 10, 1995:

> "A fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding *all other property in the Village.*" (Emphasis added.)
>
> (Appendix 8)

Thus, the Village Attorney admitted that Brinkman, the Olechs, and the Zimmers were treated differently from the owners of "all other property in the Village," not just the owners of "all other property in the Village adjacent

to a dedicated streets [sic]." Moreover, the Amended Complaint alleges that Willowbrook treated Brinkman, the Olechs, and the Zimmers differently from other property owners "because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity" to their detriment. (Appendix 8) It does not allege that they were treated differently because they lived on a nondedicated street. As noted above, the allegations of the Amended Complaint must be accepted as true.

The problem with Willowbrook's position in this case is that Willowbrook is attempting to dispute the allegations of Mrs. Olech's Amended Complaint in connection with a Rule 12(b)(6) motion. This it cannot do.

CONCLUSION

For the reasons stated herein and in her original brief, the plaintiff-appellant, Grace Olech, respectfully requests this Court to reverse the judgment entered by the district court dismissing this case, and to remand this cause for further proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ John R. Wimmer
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In the
United States Court of Appeals
for the Seventh Circuit

No. 98-2235

GRACE OLECH,

Plaintiff-Appellant,

v.

VILLAGE OF WILLOWBROOK, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 4935 – **George M. Marovich,** *Judge.*

ARGUED OCTOBER 8, 1998 – DECIDED NOVEMBER 12, 1998

Before POSNER, *Chief Judge,* and CUMMINGS and ESCHBACH, *Circuit Judges.*

POSNER, *Chief Judge.* In *Esmail v. Macrane,* 53 F.3d 176 (7th Cir. 1995), we held that the equal protection clause provides a remedy when "a powerful public official picked on a person out of sheer vindictiveness." *Id.* at 178. Although the clause is more commonly invoked on behalf of a person who either belongs to a vulnerable minority or is harmed by an irrational difference in treatment, it can also be invoked, we held, by a person who can prove that "action taken by the state, whether in the

form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." *Id.* at 180. See also *Indiana State Teachers Ass'n v. Board of School Commissioners,* 101 F.3d 1179, 1181-82 (7th Cir. 1996); *Ciechon v. City of Chicago,* 686 F.2d 511, 522-24 (7th Cir. 1982); *Batra v. Board of Regents,* 79 F.3d 717, 721-22 (8th Cir. 1996); *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen,* 932 F.2d 89, 94 (1st Cir. 1991); *LeClair v. Saunders,* 627 F.2d 606, 609-10 (2d Cir. 1980). Grace Olech brought suit against the Village of Willowbrook and two of its high officials in reliance on *Esmail's* principle and was tossed out on the defendants' Rule 12(b)(6) motion on the ground that the facts pleaded in her complaint did not fit the mold of *Esmail.*

Olech and her husband, now deceased, used to get their water from a well on their property. But the well broke down and they asked the Village of Willowbrook, where their property is located, to connect their home to the municipal water system. The Village agreed, but besides requiring the Olechs to pay the cost of the hook up (which apparently is a standard requirement and one with which they complied without complaining) told them they would have to grant the Village not the customary 15-foot easement to enable servicing of the water main but a 33-foot easement to permit the Village to widen the road on which they live. The Olechs refused, and after three months the Village relented, acceded to the smaller easement, and hooked up the water. But meanwhile the Olechs had been without water and as a consequence suffered various types of damage for which they seek redress in this suit.

So far in our recitation of the allegations of the complaint there is nothing to suggest a denial of equal protection. But the complaint goes on to allege that the defendants' motivation for insisting on the nonstandard easement was the fact that the Olechs earlier had sued the Village, and obtained damages, for flood damage caused by the Village's negligent installation and enlargement of culverts located near the Olechs' property. See *Zimmer v. Village of Willowbrook*, 610 N.E.2d 709, 712 (Ill. App. 1993). The complaint alleges that the lawsuit generated "substantial ill will" that caused the Village to depart from its normal policy of demanding only a 15-foot easement in exchange for providing municipal water and instead to decide to pave over a chunk of the Olechs' property. A letter is cited in which the Village's lawyer conceded, after the Village had backed down and agreed to require only the 15-foot easement, that that easement "will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village." For three months the Olechs had been treated differently, to their detriment, from all other property owners in the Village only because their meritorious suit against the Village had angered Village officials. These are just allegations and may be false. But as the defendants acknowledge, we must assume they are true for purposes of this appeal. The defendants have yet to file an answer or any other pleading that denies any allegation of the complaint.

Nevertheless the district judge granted the defendants' motion to dismiss because the complaint didn't allege an "orchestrated campaign of official harassment" motivated by "sheer malice," quoting our opinion in

Esmail. 53 F.3d at 179. Nothing in the *Esmail* opinion, however, suggests a *general* requirement of "orchestration" in vindictive-action equal protection cases, let alone a legally significant distinction between "sheer malice" and "substantial ill will," if, as alleged here, the ill will is the sole cause for the action of which the plaintiff complains. Esmail was complaining that he had been denied liquor licenses on the basis of trivial infractions for which no other applicant had ever been denied a license. Standing by itself, this difference in treatment would not have been a denial of equal protection, but merely an example of uneven law enforcement, than which nothing is more common nor, in the usual case, constitutionally innocent. E.g., *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Esmail v. Macrane*, *supra*, 53 F.3d at 179; *Falls v. Town of Dyer*, 875 F.2d 146, 148-49 (7th Cir. 1989); *Hameetman v. City of Chicago*, 776 F.2d 636, 641 (7th Cir. 1985). The plaintiff had to and did allege that the denial of his applications was the result not of prosecutorial discretion honestly (even if ineptly – even if arbitrarily) exercised but of an illegitimate desire to "get" him because of lawful actions by him that had aroused the mayor's ire. It was in that context that we pointed out that the complaint alleged much more than uneven enforcement.

The present case is not one of uneven enforcement. The Village does not deny that it has a legal obligation to provide water to all its residents. If it refuses to perform this obligation for one of the residents, for no reason other than a baseless hatred, then it denies that resident the equal protection of the laws. And that is sufficiently alleged. While it may have been important in *Esmail* that the plaintiff alleged an "orchestrated campaign," it was

not important here. The district judge did not try to hook up the requirement of an "orchestrated campaign" to the language or policy of the equal protection clause, and we cannot think of any hook either. Nor is it important that the oppression of the plaintiff was merely temporary. Many temporary deprivations are actionable even under provisions of the Constitution that, unlike the equal protection clause, require that the deprivation be of liberty or property. E.g., *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987); *In re Special March 1981 Grand Jury*, 753 F.2d 575, 580 (7th Cir. 1985). And to be deprived of water for three months is a potentially more serious deprivation than many permanent deprivations that we can think of.

Of course we are troubled, as was the district judge, by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case. But bear in mind that the "vindictive action" class of equal protection cases requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant. If the defendant would have taken the complained-of action anyway, even if it didn't have the animus, the animus would not condemn the action; a tincture of ill will does not invalidate governmental action. Maybe the present case can be disposed of on this or some other ground well short of trial; it cannot be disposed of on the pleadings.

And especially not on the defendants' alternative ground, that their action was not the cause of the plaintiff's lacking water for three months. They point out that had her well not broken down, which is not contended to be their fault, she would have had an uninterrupted supply of water no matter what the Village failed to do. This is a ridiculous argument. It is like saying that if she didn't live in the Village of Willowbrook she wouldn't (in all likelihood) have had a water problem. That is blaming the victim with a vengeance. Every injury has a multitude of antecedent conditions. When one of them is the defendant's culpable fault, he is not excused from liability on the ground that if some other, innocent condition hadn't been present (such as Columbus's discovery of America) no injury would have occurred. E.g., *Movitz v. First National Bank*, 148 F.3d 760, 762 (7th Cir. 1998); *United States v. Feliciano*, 45 F.3d 1070, 1075 (7th Cir. 1995); *Milam v. State Farm Mutual Automobile Ins. Co.*, 972 F.2d 166, 169 (7th Cir. 1992).

REVERSED.

No. 98-2235

A true Copy:

Teste:

/s/ _____

Clerk of the United States Court of Appeals for the Seventh Circuit

_____

(3)

No. 98-1288

In The

Supreme Court of the United States

VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of the VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of the VILLAGE OF WILLOWBROOK,

Petitioners,

v.

GRACE OLECH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE PETITIONERS

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QUESTION PRESENTED

Whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the claimant does not allege membership in a class or group, but asserts that vindictiveness motivated the government to treat her differently than others similarly situated.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (J.A. 170-175) is reported at 160 F.3d 386. The opinion of the District Court for the Northern District of Illinois, Eastern Division, dated April 13, 1998, (J.A. 60-67) is not published, but can be found at 1998 WL 196455 (N.D.Ill.).

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on November 12, 1998. No Petition for Rehearing was filed. The Petition for Writ of Certiorari was filed on February 9, 1999, and was granted on September 28, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Respondent's Amended Complaint sought relief pursuant to §1983 for an alleged violation of the Equal Protection Clause and jurisdiction was conferred under 28 U.S.C. §1331 and §1334.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment's Equal Protection Clause provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

Nature of the Case

Respondent is a resident of the Village of Willowbrook and Petitioners are the Village of Willowbrook, its President, Gary Pretzer, and its Director of Public Services, Philip J. Modaff. J.A. 4. Respondent brought this equal protection action to recover for damages sustained as a result of a delay in a construction project that connected the Village of Willowbrook's municipal water supply to her home. The Respondent has alleged that the delay occurred because Petitioners initially demanded, as a condition of extending water service, that Respondent grant to the Village a thirty-three-foot easement to improve the road adjacent to Respondent's property and along which the new water main would be installed. The Amended Complaint alleged that the delay was maliciously caused by the Petitioners in retaliation for Respondent's filing of a separate lawsuit against the Village.

The Respondent brought the cause of action pursuant to principles set forth by the Seventh Circuit Court of Appeals in the case of *Esmail v. Macrane*, 53 F.3d 176 (7th

Cir. 1995), alleging that Petitioners violated the Equal Protection Clause by singling her out as the object of their animosity. In *Esmail*, the plaintiff was denied a liquor license ostensibly due to his commission of minor infractions of the liquor code while others were granted licenses despite more severe infractions. The Seventh Circuit Court of Appeals held that the Equal Protection Clause provided a remedy despite the plaintiff's lack of membership in a vulnerable group, because "a powerful public official picked on a person out of sheer vindictiveness." 53 F.3d at 178. The court deemed the Equal Protection Clause applicable where a plaintiff could prove that "action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." *Id.* at 180.

Statement of Facts

The following facts are taken from the allegations of Respondent's Amended Complaint. The Respondent resided in the Village of Willowbrook along Tennessee Avenue which was a non-dedicated road. J.A. 4, 8-9. No easements had ever been granted to the Village of Willowbrook for the use of any portion of Tennessee Avenue. J.A. 8-9. In the spring of 1995, the Village of Willowbrook developed a plan to require all homeowners along Tennessee Avenue to be connected to the municipal water supply system by the spring of 1997. J.A. 7. Also in the spring of 1995, Respondent's well broke down and in May of 1995 she requested that the Village connect her home to the municipal water system "right away." J.A. 7, 8. Respondent used an over-ground hose to draw water

from a neighbor's well as a temporary solution. J.A. 7. In November of 1995 this hose froze, precluding Respondent from obtaining water. J.A. 12.

As part of the water extension project, the Village desired to dedicate Tennessee Avenue and improve it with pavement, sidewalks and public utilities. J.A. 9. In August and September of 1995, the Village Public Services Director, Philip J. Modaff, told Respondent that the Village would not proceed with the project unless it obtained thirty-three-foot easements from property owners who lived adjacent to Tennessee Avenue in the area where the water main would be installed. J.A. 9. The Respondent objected to providing a thirty-three-foot easement and in November of 1995, the Village agreed to require a fifteen-foot easement and a temporary construction easement of an additional five feet for the water extension project. J.A. 31. Respondent's Amended Complaint alleged that the request for a thirty-three-foot easement was not consistent with Village policy. J.A. 9-10. A letter drafted by the Village Attorney in November of 1995 included the following:

> [A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village. J.A. 10-11.[1]

The project was completed and water was delivered to Respondent's home in March of 1996, but Respondent

[1] The complete letter drafted by the Village Attorney is included in the Appendix to this brief. (App. 1-2)

was without water in her home from November of 1995 through March of 1996. J.A. 12.

The Respondent's Amended Complaint does not allege that any other Village residents who lived adjacent to non-dedicated unimproved roads were not asked for thirty-three-foot easements to improve the roads as a condition of the delivery of public water. Nor does the Amended Complaint allege that Tennessee Avenue was ultimately dedicated or improved as part of the water connection project.

The Amended Complaint alleged that Petitioners violated Respondent's equal protection rights by initially demanding the thirty-three-foot easement, an "irrational and wholly arbitrary" demand not made of others similarly situated. J.A. 10. It was further alleged that ill will generated by a separate lawsuit filed by Respondent in 1989 against the Village and Respondent's prior refusal to grant easements for a storm water drainage project favored by the Village, motivated Petitioners to treat Respondent differently. J.A. 5, 6, 10.

Course of Proceedings and Disposition Below

Respondent's original Complaint was withdrawn and Petitioners' Rule 12(b)(6) Motion to Dismiss the Amended Complaint was granted on April 13, 1998. Respondent filed a timely Notice of Appeal on May 13, 1998, and on November 12, 1998, the Seventh Circuit Court of Appeals issued its decision reversing the District Court and remanding the case to the District Court for further proceedings.

The Court of Appeals held that Respondent's allegations that Petitioners' demanded a thirty-three-foot easement while similarly-situated property owners had given fifteen-foot easements, and that Petitioners did so in retaliation for Respondent's prior lawsuit against and disagreements with the Village, were sufficient to state a cause of action for denial of equal protection. The court rested its decision on *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), which held that a government can violate the Equal Protection Clause by depriving a person of a benefit out of vindictiveness or ill will, despite the person's lack of membership in a "class."

Summary of Argument

The original intent of the Equal Protection Clause was to eliminate government discrimination against African-Americans. Even when the scope of the Equal Protection Clause was expanded by the courts, the focus remained on discrimination against classes or groups. The cases which extended its protection to non-class based discrimination were few in number. Although the decision in *Snowden v. Hughes*, 321 U.S. 1 (1944), has been cited as support for the expansion of the Clause to non-class based claims, *Snowden* actually stands for the proposition that a governmental action that maliciously singles out a person for denial of a benefit does not violate equal protection standards. This Court has continued to focus on class identification in equal protection cases. *See, e.g., City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 453 (1985) (Stevens, J., concurring).

Allegations of vindictiveness should not sustain equal protection claims, because such motivations are easy to allege and impossible to discern. Federal courts would be handed the impossible task of searching for the motive behind decisions made by public officials which offend certain individuals. This search would entail examinations of all officials involved in the decision-making process regarding their relationship with the claimant and the bases for their decision. Discretionary acts, otherwise lawful, should not be challenged simply because of the alleged improper motive of the public official.

Class-of-one claimants do not need the safeguard of the Equal Protection Clause since adequate state and federal remedies exist. Mandamus and injunctive relief in the state courts, and substantive due process claims in the federal courts, will protect class-of-one claimants from arbitrary state action.

The class-of-one equal protection claim has created a constitutionally protected interest not to be the victim of vindictiveness with the focus on the mind-set of the official, rather than the nature of the deprivation. Such focus fails to set any definable parameters for the cause of action. Recognition of a class-of-one equal protection claim will open up federal courts to review all municipal discretionary acts which are allegedly motivated by vindictiveness. Public employers, prison officials and zoning and planning boards will all be answering federal lawsuits claiming that action they took was vindictively motivated.

If this Court recognizes a class-of-one equal protection claim, such a claim should be subject to a presumption that the municipal official's conduct was constitutional and should be defeated by proof that the decision was supported by any "conceivable rational basis."

ARGUMENT

The Legislative Intent of the Equal Protection Clause was Elimination of Class-Based Discrimination

The legislative history of the Fourteenth Amendment established a foundation for equal protection jurisprudence that focused on the elimination of arbitrary classifications. Sifting the debates in search of the intent of the Fourteenth Amendment yields a single recurring theme; the equality of the African-American race. Introducing the joint resolution in the Senate, Senator Howard stated:

> This abolishes all class legislation in the states and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield it throws over the white man. *Cong. Globe*, 39th Cong., 1st Sess., 2766 (May 23, 1866).

Senator Howe spoke of Section 1 of the Amendment as being aimed at the unequal Black Codes. *Cong. Globe*, 39th Cong., 1st Sess., App. 217-26 (June 5, 6, 1866). Congressman Boyer remarked that the Fourteenth Amendment was, "intended to secure, ultimately, and to some

extent indirectly, the political equality of the Negro race." *Cong. Globe*, 39th Cong. 1st Sess., 2465-67 (May 8, 1866). Opponents of the Amendment expressed the concern that equality between the races should not be ordered by Congress. *Cong. Globe*, 39th Cong., 1st Sess., 2530 (1866).

The framers of the Civil War Amendments intended to deny to the states the power to discriminate against persons on account of race, *Loving v. Virginia*, 388 U.S. 1 (1967); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Slaughter-House Cases*, 16 Wall. 36, 71-72 (1873), and thereby create "one class of citizenship." *Bell v. Maryland*, 378 U.S. 226, 252 (1964) (Douglas, J., concurring).

The Equal Protection Clause has, by design, had a narrow application, combatting officially sanctioned or reinforced discrimination against classes or groups because a caste system was deemed abhorrent to a Republican form of government. This Court has identified the ultimate goal of the Clause to be the elimination of all governmentally imposed discrimination based on race. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

In its earliest examination of the Clause, this Court explained that its true spirit and meaning could not be understood without keeping in view the history of the times when the Fourteenth Amendment was adopted and the general object it plainly sought to accomplish. *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1880). When the Fourteenth Amendment was incorporated into the Constitution, it was anticipated that state laws might be enacted or enforced to perpetuate racial distinctions that existed for centuries. *Id.* at 306-07. The *Strauder* Court

reasoned that absent the apprehension of prejudice, the Equal Protection Clause would have been unnecessary and it might have been left to the states to extend equality of protection. *Id.* at 306-07 (1880). One hundred years later, this Court reiterated that the core of the Fourteenth Amendment was the elimination of purposeful and unjustified official distinctions based on race. *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Oyama v. California*, 332 U.S. 633, 649 (1948); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

Since the evil to be overcome by this Amendment was a caste system, it was wholly consistent with legislative intent that this Court should expand equal protection coverage beyond color lines, though still within the realm of classifications. It has been held to prohibit unjustified discrimination on the basis of gender, *United States v. Virginia*, 518 U.S. 515, 534 (1996); alienage, *Truax v. Raich*, 239 U.S. 33, 39 (1915); parentage, *Glona v. American Guarantee and Liability Insurance Company*, 391 U.S. 73, 76 (1968); criminal conviction, *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966); and type of business, *Atchison, Topeka & Santa Fe Railway v. Vosburg*, 238 U.S. 56, 62 (1915). Though the Equal Protection Clause advanced beyond protecting against racial discrimination, its central guiding principle remained the elimination of improper classifications and the protection of vulnerable groups:

> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged

> class that justifies the disparate treatment? *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 453 (1985) (Stevens, J., concurring).

At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as components of a racial, religious, sexual or national class. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). A violation of the Clause occurs only when the offending action is taken because of its adverse effects upon an identifiable group. *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979).

Judicial Application of the Equal Protection Clause Has Focused on Classifications

Until recently, the view that the Equal Protection Clause was aimed at class-based discrimination prevailed in the appellate circuits. In *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992), aff'd on other grounds, 510 U.S. 266 (1994), the Seventh Circuit Court of Appeals explained that membership in a class was a prerequisite to a successful equal protection claim. The Sixth Circuit Court of Appeals recently held that plaintiff's membership in a class was essential to a denial of equal protection. *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996). In *Futernick*, a mobile home park owner claimed that selective or vindictive enforcement of local regulations regarding effluent discharge denied him equal protection. The Court concluded that choosing to enforce the law against a particular individual was not a "classification" as that term was commonly understood. 78 F.3d 1051, 1058.

The plaintiff in *Futernick* urged the court to follow the Seventh Circuit decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), which authorized a class-of-one equal protection claim against a public official alleged to have denied a liquor license to a business owner out of sheer vindictiveness. Rejecting the plaintiff's contention that vindictiveness by a public official could trigger an equal protection claim, the Court saw compelling reasons that the motivations of local regulators should not be policed by federal judges. The Court expressed concern about the likely proliferation of class-of-one cases, cautioning that even a moderately artful complaint could characterize almost any regulatory action as both selective and mean-spirited.

Futernick reasoned that the nature of the equal protection right also militated against expanding the federal right beyond classifications. It was clearly not a violation of equal protection, the Court observed, if a local regulator, faced with limited resources, selected people to regulate in a random manner. Nor should the presence of personal animosity convert an otherwise valid enforcement action into a constitutional violation. According to *Futernick*, personal animosity not related to group identity or the exercise of protected rights is entirely random and there is no constitutionally significant category of people that have a greater or lesser chance of being affected by it. The Constitution's protection begins only when the incidence of the burden of regulation becomes constitutionally suspicious. *Futernick*, 78 F.3d 1051, 1059.

Futernick acknowledged the impropriety of municipal regulation based on vendetta, but reasoned that the states were quite capable of vindicating trammeled rights:

> Those affected by the unfair regulator have recourse to the state political processes that appointed that regulator in the first place. State courts or the state constitution may provide protection. Additionally, in extreme cases, the defendant in a regulatory action may have federal due process claims, reviewed by the Supreme Court of the United States by writ of certiorari. 78 F.3d 1051, 1059.

The Seventh Circuit Court of Appeals which issued the *Esmail* decision in 1995, considered a class-of-one claim three years earlier in *Wroblewski v. City of Washburn*, 965 F.2d 452 (7th Cir. 1992). There, the former mayor of a city alleged that due to animosity against him, the city precluded him and any member of his family from obtaining employment or subcontract work at the city's marina facility. The plaintiff claimed that he had been singled out as a "class of one" without rational basis. 965 F.2d at 458. The Seventh Circuit observed that equal protection claims generally require discrimination because of membership in a class, but decided the case on other grounds, leaving open the question of whether a class of one could raise such a claim. Three months later, in *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992), aff'd on other grounds, 510 U.S. 266 (1994), the Seventh Circuit rejected the equal protection claim of a plaintiff who brought a malicious prosecution action, concluding:

> But you must be singled out because of your membership in the class, and not just be the random victim of governmental incompetence. To close the question left open in *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992), we hold that 'the state's act of singling out an individual for differential treatment' does

not itself create the class. That would make every selective prosecution, and indeed every arbitrary act of government, a violation of the Constitution. 975 F.2d at 348 (emphasis in original).

Three years later the Seventh Circuit seemingly closed the door for good on class-of-one actions in *Herro v. City of Milwaukee*, 44 F.3d 550 (7th Cir. 1995). There, plaintiff's applications for a tavern license and occupancy permit were denied by the city's licensing committee allegedly because one member was motivated by "personal whim, prejudice, and capriciousness," and had, in the past, made baseless claims against plaintiff's family members. Rejecting this as an equal protection claim, the Court observed:

A person bringing an action under the Equal Protection Clause must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual.

* * *

It is true that older cases from this circuit suggest a broader reach to the Equal Protection Clause. *See, e.g., Falls v. Town of Dyer*, 875 F.2d 146 (7th Cir. 1989) (holding that a class of only one member can complain of discrimination against his tiny class if he can show that combination of legislative and executive action has singled him out for unique treatment). Yet we think that more recent cases, particularly *Albright*, place additional burdens on plaintiffs to identify the classification behind even a 'class of one.' 44 F.3d at 552.

The Roots of the Class-Of-One Theory

The abrupt retreat from the class requirement reflected in *Esmail*, decided only three months after *Herro*, was attributed to this Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), which, the Seventh Circuit reasoned, implied that a federal remedy ought to exist on behalf of one who suffers from the illegitimate objectives of a powerful state or local official. A similar rationale for expanding the scope of the Due Process Clause was rejected in *Parratt v. Taylor*, 451 U.S. 527 (1981), where, addressing the District Court's statement that the prisoner's loss caused by negligent prison officials should not go without redress, this Court stated that precedent and sound constitutional construction, rather than a desire to right every wrong, must govern Fourteenth Amendment jurisprudence.

Moreover, the reference in *City of Cleburne* to "illegitimate objectives" was in the context of state action directed at classes. The example this Court cited to illustrate the principle referred to group discrimination; the "bare . . . desire to harm a politically unpopular group." 473 U.S. 432, 447. The issue in *City of Cleburne* concerned the appropriate standard to be applied for review of equal protection claims brought by the mentally retarded, a group. Nowhere does *City of Cleburne* imply that the Equal Protection Clause would be implicated by vindictive conduct directed at a single person.

It is true, as *Esmail* observed, that by its terms the Equal Protection Clause is not expressly limited to protecting members of identifiable groups. It is submitted by Petitioners, however, that by interpretation reflected in a

century of equal protection jurisprudence, the application of the Clause has been limited to members of identifiable groups; an interpretation entirely consistent with the legislative intent of the Fourteenth Amendment.

The class-of-one cause of action is ultimately traced to *Burt v. City of New York*, 156 F.2d 791 (2nd Cir. 1946), where an architect claimed that city officials deliberately abused their statutory power to deny his applications for architectural projects. He claimed to be the victim of purposeful discrimination because he alone had been selected for these oppressive measures, while the applications of other architects, similarly situated, had been routinely approved. *Burt* drew upon *Snowden v. Hughes*, 321 U.S. 1 (1944), where the petitioner contended that he was denied equal protection of the laws when the respondents, members of the State Primary Canvassing Board, refused to place petitioner's name on an election ballot as required by state law. The *Snowden* majority concluded that no equal protection claim had been stated because the petitioner failed to allege intentional or purposeful discrimination. 321 U.S. 1, 8. In *Burt*, Judge Hand concluded that the "purposeful discrimination" requirement could be satisfied where plaintiff alleged that he had been singled out by the government for abusive treatment.

Although the *Snowden* Court suggested that an allegation of "purposeful discrimination" might sustain an equal protection claim, it never suggested that animosity could suffice. Moreover, "purposeful discrimination," as used in equal protection jurisprudence, means a purpose opposed by the Fourteenth Amendment, i.e., class-based discrimination. *See, e.g. Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (purposeful

discrimination "implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

Though Judge Hand speculated that *Snowden* would have found an equal protection violation had the complaint there "read a little differently," 156 F.2d 791, 792, it is unlikely that the majority would have expressly sanctioned a class-of-one cause of action without a deeper discussion of the historical purpose of the Equal Protection Clause and the ramifications of imposing federal oversight in non-class based local squabbles. It is likely that Justice Frankfurter would have argued for strict restraints on such a cause of action to safeguard both state and federal courts from the imposition of federal oversight of every decision of a municipal official. As was observed by Judge Skelly Wright:

> The key here is that the Equal Protection Clause is primarily concerned with classes or groups, not individuals. As I am confident Mr. Justice Frankfurter must have written somewhere, a case invoking the Equal Protection Clause, if it is to succeed, must allege something more than a tort, personal to the plaintiff. Wright, J., *Judicial Review and the Equal Protection Clause*, 15 Harv. C.R. – C.L. L.Rev. 1, 27 (1980).

Ultimately, *Snowden* stands as precedent for the denial of an equal protection claim brought on behalf of an individual claiming that the state willfully, maliciously and arbitrarily denied him a right granted by statute and accorded to others similarly situated. Factually, *Snowden* and the instant case are quite similar. In both cases the

government allegedly refused to provide that which the claimant reasonably expected and others had received under similar circumstances. Olech characterized Petitioners' conduct as "irrational and wholly arbitrary" motivated by "substantial ill will" (J.A. 6, 10), while Snowden alleged respondent's refusal was "willfully, maliciously and arbitrarily" motivated. 321 U.S. at 14. The *Snowden* Court held that an equal protection claim failed, despite the allegation of the government's malicious and arbitrary action. Here, Respondent's allegation of ill will is just another way of expressing the same malicious and arbitrary action which failed to state a claim in *Snowden*.

Class-Of-One Claimants Are Not Appropriate Beneficiaries of the Equal Protection Clause

Any attempt to invite additional claims under the umbrella of the Equal Protection Clause must be considered in light of the fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the states. *McLaughlin v. State of Florida*, 379 U.S. 184, 192 (1964). The underlying objective of the passage of the Civil War Amendments was the elimination of the legacy of subjugation. The predominant belief motivating the committee recommending its adoption was that a former slave could not reasonably expect any, let alone equal, protection from states which had never acknowledged the basic human dignity of the African-American. At the time that

the Equal Protection Clause was enacted, there was significant concern that state governments would be unable or unwilling to safeguard a citizen's civil rights.[2]

The plight of the intended beneficiary of the Equal Protection Clause must be compared with that of the individual asserting class-of-one status. Racial, ethnic and other classifications derive from stereotypes and prejudices that can be widespread among the populace of a geographic area. Class discrimination can pervade state government in all its branches; legislative enactment, executive implementation and judicial interpretation of laws all can be influenced by class animus. Victims of such systematic discrimination are hard pressed to find justice untainted by such prejudices within a particular locality. Thus, the Equal Protection Clause offers a federal forum for the protection of that class from discrimination resulting from perpetuated myths regarding the qualities and characteristics of its members.

Class-of-one animus, however, is no broader in scope than the relationship of the few people directly involved. Class-of-one victims do not suffer from regional discrimination. Even if the entire membership of a municipal governing board harbored ill will toward a permit-seeker, this would have no effect on the state judicial review of the board's decision. The Court need look no further than

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[2] In *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 123, n.11 (1981), Justice Brennan observed that the very reason for the enactment of the Civil Rights Act of 1871 was that there existed at that time "more than a modest distrust" of the ability of state governments to safeguard a citizen's civil rights.

the facts of this case and *Esmail* for illustration of the soundness of this observation. In both cases the claimant had, in a previous dispute with the municipality, prevailed in the state court despite the alleged animosity of village officials. J.A. 5; *Esmail v. Macrane*, 53 F.3d 176, 177 (7th Cir. 1995).

Vindictiveness Does Not Offend Traditional Notions of Equal Protection

The *Esmail* Court found vindictiveness to be the distinctive feature which gave rise to the equal protection claim.[3] 53 F.3d 176, 179. While "purposeful discrimination" has long been a necessary component of an equal protection claim, vindictiveness has never been deemed its equivalent. A legislative act otherwise in line with equal protection principles does not violate the Clause simply because of the improper motives of those who enacted it. *McCray v. United States*, 195 U.S. 27, 56 (1904).

With "vindictiveness" as the essential element of this cause of action, courts will be forced to search the record for proof of improper motivation. In *Palmer v. Thompson*, 403 U.S. 217 (1971), this Court rejected the contention that illicit motivation could lead to a finding of a violation of the Equal Protection Clause, stating, " . . . no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." 403 U.S. 217, 224. In *United States v.*

[3] Neither *Esmail* nor *Olech* cited retaliation as a necessary ingredient in the class-of-one cause of action. Retaliation claims do not implicate the Equal Protection Clause. *Watkins v. Bowden*, 105 F.3d 1344, 1354-55 (11th Cir. 1997).

O'Brien, 391 U.S. 367 (1968) the petitioner urged the Court to examine statements by lawmakers to divine the motive of Congress in passing a law prohibiting the knowing destruction of draft cards. This Court instructed that the purpose of Congress was not a basis for declaring legislation unconstitutional because an otherwise constitutional statute will not be struck down on the basis of an alleged illicit legislative motive. "The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *Id.* at 383, citing *McCray v. United States*, 195 U.S. 27, 56 (1904).

Similarly, a discretionary act of a public official should not be questioned simply because a dissatisfied resident alleges that vindictiveness contributed to the decision. There is no allegation in Respondent's Complaint that Petitioners' request for a thirty-three-foot easement was unlawful or exceeded their authority, thus, it is solely the improper motive which lies at the heart of Respondent's cause of action. J.A. 3-13. Under *Esmail*, public officials will be fearful of exercising their discretion to deny the request of any resident with whom any member of the municipal administration has had a prior disagreement.

The *O'Brien* rationale that the judiciary's institutional competence and the doctrine of separation of powers preclude exploration of legislative purpose, applies equally to a judicial inquisition into the allegedly vindictive motives of executive officials. Federal courts would be required to search for the motivation behind every municipal action that offends an individual. Compelling

executive officials to refute allegations of vindictive motivation for their exercise of discretionary authority would seem to be a transgression of judicial authority.

Surely, future class-of-one claimants will assert that a legislative body passed an ordinance for the sole purpose of harming them for malicious and vindictive reasons. Undoubtedly, in response to each allegation of evil motive, the legislature will counter with assertion of a coincident proper motive. The judicial inquiry in such cases would focus on the ill feelings of members of the legislative body toward the claimant and whether those feelings were the primary motivation for the legislative act. Such an inquiry would necessitate a full-blown examination of each legislator's relationship or experiences with the plaintiff and, if negative, an exploration of the impact such history had on his or her motives. Such an investigation would be fraught with subjective perceptions and self-serving statements and result in, at best, the fact-finder's best guess as to the legislator's feelings toward the claimant and motives for his actions. This court has recognized the futility of such an effort:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265 (1977).

In *Palmer v. Thompson*, 403 U.S. 217 (1971), the City of Jackson, Mississippi, following a court decree requiring desegregation of its public facilities, closed its swimming pools. This Court accepted the City's assertion that the

pools were closed to avoid violence and economic loss, rather than to refuse integration. This Court warned against grounding a decision on legislative purpose or motivation, and ruled that legitimate purposes asserted were not open to impeachment by evidence that the counsel members were actually motivated by racial considerations.

There will be occasions where a municipal board, comprised of multiple members, votes to deny a citizen's request with the majority of the members voting for legitimate reasons and a single member, or small minority, voting against the citizen for reasons motivated by ill will. Such cases would require depositions of all members so that it could be determined whether the ill will was a proximate cause of the denial. Will the vindictiveness of a single member of a voting board satisfy *Monell v. City of New York Dept. of Social Services*, 436 U.S. 658 (1978) and therefore establish municipal liability under §1983?

The potential chilling effect on the decisions and actions of public officials is discouraging. Any public official who has had any disagreement with a resident would be on notice that the denial of that resident's future request for any permit or service could result in a federal lawsuit. Here, for example, the Complaint alleges that Petitioners' desire was to "improve" the road adjacent to Respondent's home. J.A. 9. Obviously, such an improvement would be for the public good, especially that of the Respondent who would use the road most often; but such thoughts of improvement and the public good must be tempered by caution to avoid litigation.

Compelling Public Policy Disfavors the Class-Of-One Doctrine

Esmail observed that equal protection claims need not be supported by a loss of life, liberty or property, but rather proof of a government attempt to "get" the plaintiff for reasons unrelated to any legitimate state objective. 53 F.3d 176, 180. Thus, *Esmail* created a broad new constitutionally protected right not to be the victim of vindictiveness, with the focus on the conduct of the government official, rather than the loss suffered by the claimant. Every conceivable deprivation brought about by a vindictive public official now rises to a constitutional claim. When this Court rejected a contention that reputation was protected by the Fourteenth Amendment, it stated, in words equally appropriate to the issue now before the Court:

> Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by the respondent. *Paul v. Davis*, 424 U.S. 693, 699 (1976).

Recognition of the class-of-one equal protection claim will invite legions of claims into federal courts. The sweep will be broad; anyone with a history of opposition to or confrontation with a public official will now claim that any adverse act undertaken by that public official

was done with improper motivation and therefore in violation of the Equal Protection Clause. Any person left unsatisfied following prior dealings with a municipality would be elevated to the status of a favored party who will have made out the basis for an equal protection cause of action in the event his future requests are denied. Indeed, the Seventh Circuit in its opinion below was "troubled . . . by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case." *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (1998). With motive at the core of such claims, and notice pleading the federal standard, the vast majority of class-of-one equal protection actions will proceed through the discovery phase at least to the summary judgment stage.

If *Esmail* is adopted by this Court, could a criminal prosecution based on vindictive or malicious motives now be attacked by a defense of selective prosecution? *Esmail* expressly stated that a claimant may assert a class-of-one cause of action where he can prove " . . . that the action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." 53 F.3d 176, 180. At present, to support a defense of selective or discriminatory prosecution, a defendant bears the burden of establishing (1) that others similarly-situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, thus, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in

bad faith, i.e., based upon such impermissible considerations as race, religion or the desire to prevent the exercise of constitutional rights. *United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976). *Esmail* does not require the claimant to allege that the government retaliated against claimant's exercise of a constitutional right. There seems no logical reason why a criminal defendant who is the victim of a vindictively-motivated prosecution should face a higher standard to establish an equal protection claim than a permit-seeker whose request has been denied for vindictive reasons.

Allowing vindictiveness to establish the cause of action is unfair to failed license seekers who can show improper, but not vindictive, motivation. Would a claimant be denied a class-of-one cause of action if he could demonstrate that the deprivation was attributable to bribery by or favoritism toward a competitor? His oppression is no less harsh merely because the oppressor was not vindictive. Will arbitrary decisions, based on improper motivations other than vindictiveness, survive equal protection challenges? Or will that be the next battle ground for further expansion of the Equal Protection Clause? It is hard to perceive any logical boundary to claims arising out of allegedly improper motives.

The class-of-one also has a potentially devastating effect on public entities in the employment context. The Equal Protection Clause will be asserted by every public employee against whom an adverse employment action was taken by a "vindictive" supervisor. The employee's allegation will be that the supervisor was "out to get him." *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995)

(claimant must show that the public official engaged in "a spiteful effort to get him.").

This new cause of action will carry disappointed zoning applicants to federal court. This would clash directly with the principle that it is not the function of federal courts to serve as zoning appeals boards. *Scudder v. Town of Greendale, Ind.*, 704 F.2d 999, 1003 (7th Cir. 1983) (availability of federal review of every zoning decision would only serve to further congest an already overburdened federal court system).

This equal protection theory will provide a federal forum for a host of failed due process claims brought by prisoners. All they must allege is differential treatment and vindictiveness. The case of *Hudson v. Palmer*, 468 U.S. 517 (1984), would now enter the federal court through the Equal Protection, rather than the Due Process, Clause. In *Hudson*, the petitioner alleged that the shakedown of his cell was conducted "solely to harass" him; an allegation of vindictiveness would satisfy the *Esmail* standard.

Expansion of the Equal Protection Clause for vindictive-based claims will also undo this Court's recent attempts to limit access to the federal courts for redress in certain Fourteenth Amendment due process and Fifth Amendment "taking" cases. Currently, a due process claim, based on a random and unauthorized act of a public official, reaches federal court only if the plaintiff first avails himself of all process offered in the state's system. *See, e.g., Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981). The class-of-one cause of action will provide claimants with a federal

alternative to an otherwise premature due process claim; an allegation of vindictiveness is all that is needed.

Substantive due process claims are further restricted by the necessary presence of a liberty or property interest and assertion that defendant's conduct "shocks the conscience." *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847-49 (1992); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Adoption of the class-of-one equal protection claim will direct the claimant to a much less demanding route – any alleged damage, whether or not it involves a liberty or property interest, will support an equal protection claim if vindictiveness is alleged, even if the conduct does not shock the conscience. The dissatisfied permit-seeker would opt for the less stringent class-of-one standard rather than the more stringent substantive due process standard.

In the Fifth Amendment "taking" context, an aggrieved property owner has no federal claim until he avails himself of the procedures in place in state court for the recovery of just compensation. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). With the Equal Protection Clause open to class-of-one claims, property owners will enter federal court claiming that their property was singled out for the taking because of vindictiveness on the part of public officials.

The class-of-one cause of action reduces this majestic mechanism of equality to refereeing personal disputes whose worst component is the dislike of one party for the other. There appears no explanation in the legislative

history of the Fourteenth Amendment, nor in equal protection jurisprudence why, in adopting a provision whose motivating cause was the elimination of racial discrimination, those who drafted the Clause intended to place the federal court in a position to oversee and rectify random inequities brought about by vindictive public officials. The Equal Protection Clause would indeed be trivialized and diluted if it were to be invoked to resolve every isolated disagreement. The Constitution and its Amendments were intended to apply to "the large concerns of the governors and the governed . . . not to 'supplant' traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

Adequate Alternative Remedies Exist to Protect Class-Of-One Claimants

Illinois follows the common law that imposes a duty on municipalities operating as utilities to serve their customers without unreasonable discrimination in rates or service. *Austin View Civic Association v. City of Palos Heights*, 85 Ill.App.3d 89, 95, 405 N.E.2d 1256, 1262 (1980); *Inland Real Estate Corp v. Village of Palatine*, 146 Ill.App.3d 92, 98, 496 N.E.2d 998, 1002 (1986). A municipality that operates a utility must refrain from discriminating unreasonably among persons similarly situated. *Schroeder v. City of Grayville*, 166 Ill.App.3d 814, 817, 520 N.E.2d 1032, 1034 (1988). This common law right, unlike the constitutional right, does not require that the consumer be a member of a class. *Greater Peoria Sanitary and Sewage Disposal District v. Kellstedt*, 130 Ill.App.3d 1002, 1005, 474 N.E.2d 1267, 1269 (1985).

In Illinois, discretionary acts of a public official which are arbitrary and capricious are subject to injunctive relief. *Arnold v. Engelbrecht*, 164 Ill.App.3d 704, 518 N.E.2d 237 (1987). Such relief is also available where fraud, corruption or gross injustice is alleged. *Illinois Federation of Teachers v. Board of Trustees, Teachers' Retirement System*, 191 Ill.App.3d 769, 548 N.E.2d 64 (1989). In Illinois, municipal immunity does not extend where injunctive relief is sought (745 ILCS 10/2-101) or where corrupt or malicious motives are alleged. *Madonna v. Giacobbe*, 190 Ill.App.3d 859, 869, 546 N.E.2d 1145, 1152 (1989). Where a public official's non-discretionary authority is at issue, a writ of mandamus is available in state court. *McClaughry v. Village of Antioch*, 296 Ill.App.3d 636, 695 N.E.2d 492 (1998). Decisions of administrative bodies may be overturned by Illinois courts where authority was exercised in an arbitrary or capricious manner or the decision was against the manifest weight of the evidence. *O'Neil v. Ryan*, 301 Ill.App.3d 392, 703 N.E.2d 511 (1998). Legislative acts which are arbitrary and capricious will also be overturned by Illinois courts. *People v. Thompson*, 275 Ill.App.3d 725, 730, 656 N.E.2d 77, 81 (1995). In addition to the state remedies a federal action may be brought where the claimant was arbitrarily deprived of a liberty or property interest in a manner which shocks the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 846-48 (1998).

Allowing an equal protection claim before state "protection" has been sought renders the federal courts the substitute tribunal when the state courts would be adequate. In this case, the Respondent purposely avoided an immediately available state remedy. Then, after the water

of which she allegedly had been deprived was provided, launched a federal action, seeking, in addition to compensatory damages, attorneys' fees and punitive damages which could not be obtained in the state court. J.A. 26.

Petitioners submit that Respondent's failure to avail herself of state remedies precludes a denial of equal protection. This Court explained in *Hudson v. Palmer*, 468 U.S. 517 (1984), that to determine whether a due process violation has resulted from the random and unauthorized act of a public official, it was necessary to focus on whether state tort remedies provided a means of redress to satisfy procedural due process requirements. Thus, due process contemplates all procedures available to the victim to undo the deprivation. This Court further clarified in *Zinermon v. Burch*, 494 U.S. 113, 126 (1990), that the constitutional violation under §1983 is not complete when the deprivation occurs; "it is not complete unless and until the State fails to provide due process." This approach was not deemed violative of the directive of *Monroe v. Pape*, 365 U.S. 167 (1961), that state remedies need not be exhausted before filing a §1983 action, because the constitutional violation does not occur until the state remedy is utilized. The state remedy is part of the process that is due. So too, an equal protection violation should not occur until the victim is deprived of the protection offered by state law to redress the grievance. Just as due process includes any available state process, equal protection should include the remedies offered by the state procedures. This is particularly so for class-of-one claimants. Each scenario in which such claims has arisen involved action taken by a public official on a set of facts unique to the claimant. If the act was lawful, its

vindictive motivation should not make it a violation of the Equal Protection Clause; if the act was unlawful, it can be readily redressed through state court procedures.

In his concurring opinion in *Snowden*, Justice Frankfurter expressed his belief that the action taken by a public employee in contradiction with state law could not be deemed state action for equal protection purposes until the state court "confirms such action and thereby makes it the law of the state." 321 U.S. 1, 17 (1944). This observation is rooted in notions of Federalism and comity. In the context of abstention, this Court has recognized the adequacy of the state interest and forum to resolve constitutional disputes. *Juidice v. Vail*, 430 U.S. 327 (1977). *Juidice* found that state court defendants need only have the opportunity to present their federal claims in state court for *Younger* abstention to apply.

Petitioners do not suggest that a plaintiff must exhaust his state remedies before seeking relief for equal protection violations in federal court. Rather, it is submitted that an equal protection violation does not occur until the claimant shows that the state apparatus sustained or otherwise failed to rectify the equal protection denial. In this sense, the equal protection deprivation is incomplete until the state has failed to provide equal protection by reversing the initial act. Underlying *Parratt* and *Hudson* is the recognition that the due process analysis does not end with the act of the official who deprived the plaintiff of his property. This view flows naturally from the fact that the Fourteenth Amendment speaks of "state" action; the state has not acted until the remedial process it provides has been utilized.

It is a long-standing principle that federal courts should not be in the business of granting federal remedies for mere violations of state law. *Snowden v. Hughes*, 321 U.S. 1, 11 (1944). The Fourteenth Amendment is not a font of tort law to be superimposed upon whatever systems may already be administered by the states. *Paul v. Davis*, 424 U.S. 693, 701 (1976). The equal protection concept was not intended to duplicate common law tort liability by conflating all persons not injured into a preferred class. *Booher v. United States Postal Service*, 843 F.2d 943, 944 (6th Cir. 1988). "The concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review by federal courts." *Indiana Teachers Association v. Board of School Commissioners of the City of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996).

Any Class-Of-One Equal Protection Cause of Action Should Be Subject to the Rational Basis Standard

If the class-of-one cause of action is sanctioned by this Court, it should carry the presumption of the constitutionality of the government's conduct and should be defeated by proof that the governmental action was supported by any conceivable rational basis. *McGowan v. Maryland*, 366 U.S. 420 (1961); and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (a legislative classification will deny equal protection only if it is not rationally related to a legitimate state interest). The burden should fall upon the claimant to negate every conceivable rational basis which might support the governmental action. *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 364 (1973). Absent such a burden, an otherwise

legitimate government decision could constitute an equal protection violation because the public official harbored ill will for the claimant.

The presumption of constitutionality is reinforced in this case by Respondent's allegation that at least one purpose of the Village's request for the thirty-three-foot easement was a desire to improve the roadway adjacent to which the water main would be placed with pavement, sidewalks and public utilities. J.A. 22. The attorney's letter, cited in the Amended Complaint, explains that the request for the thirty-three-foot easement was consistent with the intent of the grantor when the parcels were originally subdivided and deeded. The original deeds indicated that the parcels, including Respondent's, were subject to the right of public travel over the thirty-three feet bordering Tennessee Avenue. (App. 1-2) At worst, Respondent was a random victim of governmental error and a claim for violation of equal protection will not lie where the governmental action was taken out of error, neglect or mistake. *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). Thus, if a rational basis standard is applied to this case, Respondent's Complaint does not state a cause of action.

The plaintiff should also be held to a pleading standard that would require factual support of allegations that similarly-situated persons were treated differently. Absent such fact pleading, frivolous class-of-one claims will never be dismissed before summary judgment and will therefore necessitate protracted and expensive discovery. Applying such a pleading standard to this case supports the dismissal of the Amended Complaint since it did not include factual support for the allegation that

Respondent was treated differently than others similarly situated.

CONCLUSION

Wherefore, Petitioners pray that this Court will enter its Order reversing the decision issued by the Seventh Circuit Court of Appeals.

Respectfully submitted,

JAMES L. DEANO
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November 10, 1999

LAW OFFICES OF
GORSKI & GOOD

[Names And Address Omitted In Printing]

November 10, 1995

Mr. John Wimmer
928 Warren Avenue
Downers Grove, Illinois 60515

RE: Tennessee Avenue/Willowbrook

Dear John:

As you know, we have been awaiting the results of title research by Chicago Title as to several parcels of property along Tennessee Avenue, in regard to the request for connection to the Village's water supply. The research has revealed that the two parcels on the west side owned by the Olechs and Phyllis Zimmer are subject to thirty three feet (33') easements along the east (Tennessee Avenue) side in favor of Northern Illinois Gas Co.

In addition, all nine of the parcels were at one time under common ownership. When the property was deeded out to different owners, the original deeds all contained language that they were subject to the right of public travel over the east and/or west thirty three feet (33') of each parcel (along Tennessee Avenue). Clearly this evidences an intent that such portions of the property be used for a public roadway.

The Village's original position of requesting a dedication of thirty three feet (33') is certainly consistent with, and vindicated by, the results of this research. That position was taken in an effort to clear up any confusion that

exists over the legal status of the property. It is unfortunate that your clients have been unwilling to do so, as the search results confirm exactly what the Village was attempting to do.

As we have discussed, in an effort to alleviate your client's water problem, the Village has moved off of its original position and indicated that a fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village. It is the Village's position that such an easement is both reasonable and necessary. Of course, it is still necessary to determine where the connections to the main will be located. As I have previously advised you, the Village is working towards obtaining the necessary easements along the east side of the road so that the main can be properly installed.

If you have any additional thoughts, please feel free to call.

Very truly yours,

/s/ Jerry
GERALD M. GORSKI

GMG:nm

No. 98-1288

In The

Supreme Court of the United States

VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of the VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of the VILLAGE OF WILLOWBROOK,

Petitioners,

v.

GRACE OLECH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT GRACE OLECH

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Equal Protection Clause is violated when the government treats an individual differently from others similarly situated as a result of ill will or other illegitimate animus on the part of the government toward that individual, as opposed to ill will or other illegitimate animus on the part of the government toward some group or class of which the individual is a part?

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STATEMENT OF THE CASE

I. Nature of the Case

The Respondent, Grace Olech ("Olech" or "Mrs. Olech"), filed this action against the Petitioners, the Village of Willowbrook, an Illinois municipal corporation ("Willowbrook"), Gary Pretzer, individually and as President of Willowbrook ("Pretzer"), and Philip J. Modaff, individually and as Director of Public Services of Willowbrook ("Modaff"). The action was filed under 42 U.S.C. §1983 and sought damages based on the violation of Mrs. Olech's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution. (App. 3-13) The Petitioners filed a motion to dismiss Mrs. Olech's Amended Complaint under Fed.R.Civ.P. 12(b)(6) (App. 14-26), and the district court granted that motion (App. 122-124) and entered judgment for the Petitioners (App. 133). The Court of Appeals for the Seventh Circuit reversed. (App. 170-175)

II. Statement of Facts

This action was commenced on July 11, 1997, when Grace Olech filed her Complaint (Record, Document 1-1, App. 1) in the United States District Court for the Northern District of Illinois, Eastern Division, against the Village of Willowbrook, Pretzer, and Modaff. On October 8, 1997, Mrs. Olech filed an Amended Complaint (App. 3-13), having received leave of court to do so. (App. 1)

In her Amended Complaint, Mrs. Olech alleged that she was a citizen of the United States and a resident of Willowbrook. (App. 4) Mrs. Olech brought the lawsuit

under 42 U.S.C. §1983 to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution. (App. 4)

According to the Amended Complaint, on August 8, 1989, Mrs. Olech and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Willowbrook and other defendants in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 ("the state court lawsuit"), in which the plaintiffs sought money damages from Willowbrook and the other defendants as a result of the flooding of the plaintiffs' property by stormwater. (App. 5) Howard Brinkman's claims in the state court were dismissed for want of prosecution on April 1, 1991. (App. 5) The Olechs' claim against Willowbrook in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Mrs. Olech, individually and as special administrator of the estate of Thaddeus Olech, and against Willowbrook in the amount of $20,000.00, and judgment was entered on the verdict. (App. 5) The claim of Rodney C. Zimmer and Phyllis S. Zimmer against Willowbrook in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of the Zimmers and against Willowbrook in the amount of $135,000.00, and judgment was entered on that verdict. (App. 5) Grace Olech is Phyllis Zimmer's mother. (App. 4)

According to the Amended Complaint, the state court lawsuit against Willowbrook, which was ultimately

determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Willowbrook, and generated substantial ill will toward the plaintiffs in the state court lawsuit on the part of Willowbrook and its officers and employees, including Modaff and Pretzer. (App. 6) The Amended Complaint alleged that said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Willowbrook and its officers and employees look bad, from the erroneous belief on the part of Willowbrook's officers and employees that the state court lawsuit was frivolous and meritless, and from the fact that, prior to the filing of the state court lawsuit, Grace and Thaddeus Olech and Howard Brinkman had refused to grant certain drainage easements for a storm water drainage project favored by Willowbrook. (App. 6)

From a long time prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on November 24, 1996, Grace Olech and Thaddeus Olech were the joint owners of and resided in a single family home at 6440 Tennessee Avenue in Willowbrook, Illinois, on the west side of Tennessee Avenue. (App. 6-7) Since the death of Thaddeus, Grace Olech has been the sole owner of this property ("the Olech property") and has continued to reside there. (App. 7) In the spring of 1995 the private well on the Olech property, which provided potable water for the Olech home, broke down and was beyond repair. (App. 7) The Olechs then implemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney and Phyllis Zimmer, via an overground hose.

(App. 7) At that time Willowbrook's water main on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of the Olechs on Tennessee Avenue. (App. 7)

By the spring of 1995 Willowbrook had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to Willowbrook's municipal water system, to hook up to the system. (App. 7) There is nothing in the record to suggest that this plan contemplated dedication of Tennessee Avenue to Willowbrook or its paving or the installation of sidewalks.

On May 23, 1995, while the state court lawsuit was pending, Grace Olech and Thaddeus Olech, along with Howard Brinkman, and Rodney and Phyllis Zimmer, made a request to Willowbrook that their homes be hooked up right away to Willowbrook's municipal water supply system. At or about that time Modaff was informed that the well on the Olech property had broken down, and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing. (App. 8) As required by law, Willowbrook undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each of the three parcels of property involved of one-third of the estimated cost of the project. (App. 8) On July 11, 1995, Grace and Thaddeus Olech paid to Willowbrook $7,012.67, representing their share of the estimated cost of the project,

and by July 12, 1995, Willowbrook had received the required payments from Howard Brinkman and the Zimmers. (App. 8)

According to the Amended Complaint, the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the Zimmer property is not, and never has been a dedicated public street, and no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue adjacent to the Brinkman, Olech, or Zimmer properties. (App. 8-9)

In August of 1995 Modaff told Phyllis Zimmer that Willowbrook would not proceed with the project unless all of the property owners involved granted Willowbrook a 33-foot easement along Tennessee Avenue, and in that same month Pretzer told Phyllis Zimmer that the 33-foot easement would be required for the project. (App. 9) On September 21, 1995, Modaff sent to Grace and Thaddeus Olech and to the other property owners involved a Plat of Easement whereby they and the property owners on the other side of Tennessee Avenue would each dedicate to Willowbrook a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant to Willowbrook a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street. (App. 9)

According to the Amended Complaint, the defendants' demands for 33-foot easements and a 66-foot dedicated street as a condition of the extension of the water main were not consistent with the policy of Willowbrook

regarding other property in Willowbrook. (App. 9-10) The Village Attorney, Gerald M. Gorski, eventually admitted as much in a letter dated November 10, 1995, in which he stated as follows:

> "[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

(App. 10)

The Amended Complaint alleges that the Petitioners treated Grace and Thaddeus Olech, Howard Brinkman, and Rodney and Phyllis Zimmer differently from other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit *and in an attempt to control stormwater drainage in the vicinity to the detriment of the Olechs and the other plaintiffs in the state court lawsuit by the use of ditches and swales along Tennessee Avenue.* (App. 10) The Amended Complaint alleges that the Petitioners' decision to treat the Olechs and the other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main was irrational and wholly arbitrary, and was made by the appropriate policy-making official or employee of Willowbrook. (App. 10)

According to the Amended Complaint, because the 33-foot easements and the 66-foot dedicated street

demanded by the Petitioners were not consistent with what the Petitioners required in relation to other property in the Village of Willowbrook, Grace and Thaddeus Olech and the other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication. (App. 10-11) And from the time that Modaff first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project. (App. 11)

On November 10, 1995, Willowbrook relented and withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Willowbrook were granted a 15-foot easement for the water main and for related water service lines used to connect the homes. (App. 11) The easement demanded by Willowbrook in its attorney's letter of November 10, 1995, was consistent with what was required by Willowbrook in relation to other property in Willowbrook, and, therefore, Grace and Thaddeus Olech, and the other property owners involved agreed to grant that easement. (App. 11)

The Amended Complaint alleged that the initial refusal of the Petitioners to proceed with the project unless Willowbrook was granted the 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather. (App. 11) In November of 1995 the overground hose used by Grace and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Grace and Thaddeus Olech were without running water from November of 1995 until the project was completed on

March 19, 1996. (App. 12) The Amended Complaint alleges that "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress." (App. 12) The Amended Complaint alleges that the initial refusal of the Petitioners to proceed with the project unless Willowbrook was granted the 33-foot easements and 66-foot street dedication "and the concomitant and resulting delay in the project" deprived Grace Olech of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the Petitioners in that regard were undertaken either with the intent to deprive Grace Olech and others of those rights, or in reckless disregard of those rights. (App. 12) Finally, the Amended Complaint alleged that the actions and inactions of the Petitioners set forth therein were undertaken under color of state law. (App. 12) Grace Olech sought compensatory and punitive damages as well as an award of her reasonable attorney's fees under 42 U.S.C. §1988. (App. 13)

The Petitioners filed a Motion To Dismiss Plaintiff's Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) (App. 14-26), along with a Memorandum Of Law In Support Of Motion To Dismiss (App. 27-35). Mrs. Olech filed Plaintiff's Response To Defendants' Motion To Dismiss

The Amended Complaint (App. 36-48), and the Petitioners filed a Reply (App. 49-59).

The district court issued a Memorandum Opinion And Order (App. 60-67) on April 13, 1998, granting the Petitioners' motion to dismiss, and on the same date issued a minute order granting the Petitioners' motion to dismiss (App. 68-70), and a Judgment In A Civil Case which dismissed the action in its entirety. (App. 71)

Grace Olech filed a timely Notice Of Appeal (Record, Document 23, App. 2), and, following briefing (App. 72-169) and oral argument, the Court of Appeals for the Seventh Circuit reversed. (App. 170-175) *Olech v. Village of Willowbrook*, 160 F.3d 386 (7th Cir. 1998).

Willowbrook's Statement of Facts is incorrect insofar as it implies that the plan developed by Willowbrook in the spring of 1995, which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to municipal water system of Willowbrook, to hook up to the system, contemplated a dedication of Tennessee Avenue and improvements with sidewalks and public utilities, and insofar as it implies that the homes of Howard Brinkman, Grace Olech, and the Zimmers were hooked up pursuant to that plan. (Willowbrook's brief, p. 4.) The only reference to Willowbrook's plan in the Amended Complaint is in paragraph 18 where it is alleged that by the spring of 1995 Willowbrook had developed a plan, which was to be implemented within two years of the spring of 1995, and which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to the municipal water supply system, to hook up to the system. (App. 7) That allegation

explains why the Olechs did not drill a new well when, in the spring of 1995, their well broke down and was beyond repair because they were going to have to hook up within two years anyway. But the Amended Complaint does not allege that Willowbrook's plan contemplated a dedicated street, including sidewalks and public utilities, or that the homes of Brinkman, the Olechs, and the Zimmers were hooked up pursuant to that plan. (In fact, if Willowbrook's plan had included dedication of the street, it would have required Willowbrook to pay the property owners for the easement rights involved because private property may not be taken for public purposes without just compensation. (U.S. Const., Amend V.)) The issue of a street dedication did not come up until shortly after Howard Brinkman, the Olechs, and the Zimmers, the plaintiffs in the state court lawsuit, notified Willowbrook of the Olechs' problem and requested that their homes be hooked up right away. (App. 8-9) The homes of Brinkman, the Olechs, and the Zimmers were not hooked up pursuant to Willowbrook's two-year plan. Brinkman, the Olechs, and the Zimmers requested the extension of the water main right away in the spring of 1995, and the homeowners, themselves, paid for the project. (App. 8)

Amici curiae supporting Willowbrook state that "[a]t no time did Mrs. Olech seek injunctive relief under state law." (*Amici's* brief, p. 6, n. 5.) There is nothing in the record to support that statement.

SUMMARY OF ARGUMENT

This Court should decline to consider the question on which this Court granted certiorari and should dismiss the writ of certiorari as improvidently granted because the Village of Willowbrook, Gary Pretzer, individually and as President of the Village of Willowbrook, and Philip J. Modaff, individually and as Director of Public Services of the Village of Willowbrook (hereinafter referred to collectively as "Willowbrook"), did not raise that question in the district court or the Court of Appeals for the Seventh Circuit.

In the alternative, this Court should affirm the judgment of the Court of Appeals for the Seventh Circuit, and should reject Willowbrook's argument that the Equal Protection Clause of the Fourteenth Amendment should be applied unequally, protecting persons against whom the State purposely discriminates because of an illegitimate animus against a "class" or "group" of which the persons are a part, but not protecting persons against whom the government purposely discriminates because of ill will or other illegitimate animus against the particular person involved. There is nothing in the language of the Equal Protection Clause to suggest such a restriction in its application, or even to create an ambiguity in that regard. In fact, this Court has already held the Equal Protection Clause to be violated by purposeful discrimination against a "class of one." (*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923).) Judge Posner's opinion for the Court of Appeals in the instant case, which required Mrs. Olech to prove that Willowbrook's purposeful unequal treatment of her was " 'wholly unrelated to any

legitimate State objective' " (160 F.3d 386, 387), was consistent with this Court's prior decisions, and prior decisions of the Courts of Appeals.

This Court should decline to consider Willowbrook's arguments relating to exhaustion of state remedies because those arguments were not presented to or addressed by the courts below, nor were those arguments raised by Willowbrook in its Petition For A Writ Of Certiorari. In any event, this Court has held that a person need not exhaust his state remedies to state a claim for violation of his rights under the Equal Protection Clause.

This Court should decline to consider the arguments of Willowbrook and its *amici curiae* to the effect that, assuming that the Equal Protection Clause protects "classes of one," the Amended Complaint in this case fails to state a cause of action for violation of the Equal Protection Clause because this Court explicitly denied certiorari on that question, and because the specific arguments advanced by Willowbrook and its *amici* in that regard were not included in Willowbrook's Motion To Dismiss Plaintiff's Amended Complaint (App. 14-26) or Willowbrook's Memorandum Of Law In Support Of Motion To Dismiss (App. 27-35)

In any event, Mrs. Olech's Amended Complaint in this particular case adequately alleges that her rights under the Equal Protection Clause were violated by Willowbrook.

ARGUMENT

This Court should decline to consider the question on which certiorari was granted because that question was not raised by Willowbrook in the district court or the Court of Appeals.

The Petitioners seek to have this Court decide the following question:

> "Whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the claimant does not allege membership in a class or group, but asserts that vindictiveness motivated the government to treat her differently than others similarly situated."

(Petitioners' Brief, p. i.)

The Petitioners did not present that question to the district court in their Motion To Dismiss Plaintiff's Amended Complaint (App. 14-26) or in their Memorandum Of Law In Support Of Motion To Dismiss (App. 27-35).

In fact, in their Memorandum Of Law In Support Of Motion To Dismiss, the Petitioners explicitly acknowledged that a violation of the Equal Protection Clause may occur when the unequal treatment involved is not based on membership in a vulnerable group, but rather where a powerful public official picked on "a person" out of sheer vindictiveness and where there was an orchestrated campaign of official harassment directed at "the individual" out of sheer malice. (App. 33) The Petitioners wrote:

"The Plaintiff seeks to impose §1983 liability on the Defendants under what has been colloquially known as 'Category Three' discrimination. Within the general rubric of equal protection law, a plaintiff must show disparate treatment based on membership in a vulnerable group, racial or otherwise, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985), or based upon the application of laws or policies which make irrational distinctions. *Lindsey v. Normet*, 405 U.S. 56, 74-79, 92 S.Ct. 862, 874-77, 31 L.Ed.2d 36 (1972). 'Category Three' discrimination, however, occurs where 'a powerful public official picked on a person out of sheer vindictiveness,' and where there is 'an orchestrated campaign of official harassment' directed at the individual 'out of sheer malice.' *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995)."

(App. 32-33)

In other words, the position taken by Willowbrook in the district court was the opposite of the position that it is taking in this Court. And, while it is true that the district court was bound to follow the decision of the Court of Appeals for the Seventh Circuit in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), which had recognized a violation of the Equal Protection Clause in the context of intentional discrimination against a "class of one," there would have been no procedural obstacle in the district court to Willowbrook in arguing that *Esmail* was not correctly decided in order to preserve the question for review.

The only issues raised in Willowbrook's Memorandum Of Law In Support Of Motion To Dismiss were the

following: "1. The Amended Complaint Lacks Sufficient Allegations of Malice on the Part of the Defendants" (App. 33), and "2. The Plaintiff Has Pled Herself Out of an Action By Alleging that Other Homeowners Were Asked to Grant a 33-Foot Easement" (App. 34).

In the Petitioners' Reply to Plaintiff's Response To Defendants' Motion To Dismiss The Amended Complaint, in connection with its argument that Mrs. Olech had failed sufficiently to allege malicious conduct, Willowbrook did state in a footnote, citing *Sarantakis v. Village of Winthrop Harbor*, 969 F.Supp. 1095 (N.D.Ill. 1997), that the Olech case involved the denial of government services rather than the refusal of a license, and that "[w]here the claim involves the denial of governmental services, according to *Sarantakis*, equal protection claims must be based on discrimination directed at groups, rather than individuals." (App. 50) This footnote did not properly raise any issue because of the rule in the district court that arguments in support of a motion to dismiss not raised in the district court until the reply are waived. (*Lockrey v. Leavitt Tube Employees' Profit Sharing Plan*, 748 F.Supp. 662, 667 (N.D.Ill. 1990).) Moreover, Willowbrook's footnote in its Reply did not purport to raise the broad question that the Petitioners are attempting to raise in this Court.

In the Court of Appeals for the Seventh Circuit, Willowbrook again failed to argue that the Equal Protection Clause is not violated when the government intentionally discriminates against a "class of one." The Petitioners' brief in the Court of Appeals had three argument headings: "I. Plaintiff's First Amended Complaint Fails to State a Cause of Action Under Principles Set

Forth in the Case of *Esmail v. Macrane,*" "II. Plaintiff Has Not Alleged That Similarly-Situated Individuals Were Treated Differently," and "III. Defendants' Conduct Was Not the Cause of Plaintiff's Injury." (App. 137) In the course of their argument that Mrs. Olech's Amended Complaint failed to state a cause of action under the principles set forth in *Esmail v. Macrane,* the Petitioners did elaborate as follows on the contention from the footnote of their Reply that the "class of one" analysis which applies to the denial of licenses does not apply to the denial of government services:

> "*Sarantakis* is also noteworthy because it, like the instant case, involved the denial of governmental services, as opposed to the refusal of a business license at issue in *Esmail. Sarantakis* holds that where the claim involves the denial of governmental services, the equal protection claim must be based upon discrimination directed at groups, rather than individuals. 969 F.Supp. at 1105. It is submitted by Defendants that *Sarantakis,* rather than *Esmail,* controls this case and Plaintiff's alleged 'classification of one' does not state a claim for equal protection. Indeed, the *Esmail* doctrine has not been accepted at all in the Fourth or Sixth Circuits. *Edwards v. City of Goldsboro* (E.D.N.C. 1997) 981 F.Supp. 406, 410; *Futernick v. Sumpter Township,* 78 F.3d 1051 (6th Cir. 1996); and *Dubuc v. Green Oak Township,* 958 F.Supp. 1231, 1236-37 (E.D.Mich. 1997)."

(App. 149-150)

The Petitioners did not, however, argue what they are attempting to argue in this Court, that the Equal Protection Clause is not violated when the government

intentionally discriminates against a "class of one," nor did the Petitioners urge the Court of Appeals for the Seventh Circuit to overrule its decision in *Esmail.*

Under these circumstances, the issue should not be addressed on the merits in this Court. As this Court stated in *Equal Employment Opportunity Commission v. Federal Labor Relations Authority,* 476 U.S. 19, 24 (1986):

> "Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals. [Citations omitted.]"

Moreover, in *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981), this Court held that, although the petition for certiorari presented a certain question on which the petitioner was seeking a decision, "that question was not raised in the Court of Appeals and is not properly before us." And in *United States v. Ortiz,* 422 U.S. 891, 898 (1975), this Court declined to consider the government's argument regarding retroactive applicability of a certain constitutional decision because an "[e]xamination of the Government's brief in the Ninth Circuit indicates that it did not raise this question below." This Court should dismiss the writ of certiorari in this case as improvidently granted.

The Equal Protection Clause is violated when the government purposely treats a person differently from others similarly situated as a result of ill will or other animus on the part of the government toward that person, and for reasons wholly unrelated to any legitimate state objective.

The contention of Willowbrook is that the Equal Protection Clause should be applied unequally, protecting persons against whom the government purposely discriminates because of an illegitimate animus against a "class" or "group" of which the persons are a part, but not protecting persons against whom the government purposely discriminates because of ill will or illegitimate animus against the particular person involved. There is nothing, however, in the language of the Equal Protection Clause to suggest such an interpretation. The Equal Protection Clause states, "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., Amend XIV, §1.) By its terms, the clause applies to denials of the equal protection of the laws by a State "to any person." There is nothing in the language to suggest that the provision protects persons only insofar as they are members of some "class" or "group," nor does the language even create an ambiguity in that regard. In *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326 (1816), this Court, in an opinion by Justice Story construing the language of the constitution, stated:

> "The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."

Justice Story wrote, "If the text be clear and distinct, no restriction upon its plain and obvious import ought to be

admitted, unless the inference be irresistible." (1 Wheat. 304, 338-339.) Moreover, as this Court state in *United States v. Sprague*, 282 U.S. 716, 731-732 (1931):

> "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition."

Accordingly, it would be improper to engraft onto the Equal Protection Clause a limitation on its application to persons who are members of disfavored "classes" or "groups."

This conclusion is especially compelling when one compares the language of the Equal Protection Clause of the Fourteenth Amendment to §1 of the Fifteenth Amendment. The Fifteenth Amendment provides as follows:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

(U.S. Const., Amend. XV, §1.)

The Fifteenth Amendment includes specific language limiting its application to denials or abridgements of the right to vote because of membership in a group. There appears to be no reason why similar language would not have been included in the Equal Protection Clause if it had been the intention of the framers of that provision to limit its application to denials of the equal protection of the laws based on membership in a "class" or "group."

As this Court stated in *United States v. Sprague*, 282 U.S. 716, 732 (1931), in a discussion regarding article 5 of the constitution, "The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase . . . is persuasive evidence that no qualification was intended." A consideration of the language of the Equal Protection Clause, therefore, compels the conclusion that it applies to a denial of the equal protection of the laws by a State to a person irrespective of that person's membership in a "class" or "group," or, in the words chosen by Willowbrook, to a "class of one." But there is more than the language, itself, to compel that conclusion, however, because this Court has already construed the Equal Protection Clause to apply to purposeful discrimination by a State against a "class of one."

In *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, the question before this Court was "whether the taxing authorities of the state of Nebraska and of Dakota county in assessing taxes against the petitioner, the Sioux City Bridge Company, upon that part of its bridge across the Missouri river at South Sioux City, which is in the jurisdiction of Nebraska, deprived the Bridge Company of due process of law and denied it the equal protection of the laws in violation of the Fourteenth Amendment." (260 U.S. 441, 441-42.) The Sioux City Bridge Company maintained that, although state law called for uniform assessments on all property, the county assessor and the county board of equalization "intentionally and arbitrarily assessed the Bridge Company's property at 100 per cent. of its true value and *all the other real estate and its improvements in the county* at 55 per cent." (Emphasis added.) (260

U.S. 441, 445.) The Sioux City Bridge Company did not maintain that it was part of a "class" or "group" that was treated differently from other taxpayers. In fact, it is clear from the Sioux City Bridge Company's contention that "all the other real estate and its improvements in the county" were assessed at 55 per cent that the Sioux City Bridge Company was asserting its claim as a "class of one."

This Court accepted the case on writ of certiorari to the Supreme Court of Nebraska. The Supreme Court of Nebraska did not make it clear whether the discrimination charged had been proved or not, but assuming the discrimination, that court had held that the Sioux City Bridge Company had no remedy except " 'to have the property assessed below its true value raised rather than to have property assessed at its true value reduced.' " (260 U.S. 441, 445-46.) This Court reversed the judgment of the Supreme Court of Nebraska and remanded the case for further proceedings not inconsistent with this Court's opinion. In reversing the Supreme Court of Nebraska, this Court first quoted the following language from this Court's decision in *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 352-353 (1918):

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional

right of *one* taxed upon the full value of his property. Raymond v. Chicago Union Traction Co., 207 U.S. 20, 35, 37." (Emphasis added.)

(260 U.S. 441, 445.)

This Court then addressed the decision of the Supreme Court of Nebraska as follows:

"The dilemma presented by a case where *one or a few* of a class of taxpayers are assessed at 100 per cent. of the value of their property in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage in violation of the law, has been often dealt with by courts and there has been a conflict of view as to what should be done. *There is no doubt, however, of the view taken of such cases by the federal courts in the enforcement* of the uniformity clauses of state statutes and constitutions and *of the equal protection clause of the Fourteenth Amendment.* The exact question was considered at length by the Circuit Court of Appeals of the Sixth Circuit in the case of Taylor v. Louisville & N. R. Co., 88 Fed. 350, 364, 365, 31 C. C. A. 537, and the language of that court was approved and incorporated in the decision of this court in Greene v. Louisville & Interurban R. Co., 244 U.S. 499, 516, 517, 518, 37 Sup.Ct. 673, 61 L.Ed. 1280. The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of underassessed property in the taxing district. *This court holds* that the right of the taxpayer whose property *alone* is taxed at

100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. This conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company." (Emphasis added.)

(260 U.S. 441, 446-447.)

It is clear, based on the foregoing language from this Court's opinion in *Sioux City Bridge Co.*, that the opinion was based on the Equal Protection Clause of the Fourteenth Amendment, and that this Court held that such clause prohibited intentional discrimination against a "class of one." The Court described the object of the purposeful discrimination as "*one* taxed upon the full value of his property" (emphasis added) (260 U.S. 441, 445), "*one* or a few of a class of taxpayers" (emphasis added) (260 U.S. 441, 446), and "the taxpayer whose property *alone* is taxed at 100 per cent. of its true value" (emphasis added) (260 U.S. 441, 446). And, of course, in *Sioux City Bridge Co.* the alleged facts were that only one taxpayer was purposely treated differently from the others.

The principle recognized in *Sioux City Bridge Co.* was reaffirmed as recently as 1989 in *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989), in which

this Court held that the method of assessing property values by the tax assessor of Webster County, Virginia, denied the petitioners the equal protection of the laws guaranteed to them by the Fourteenth Amendment. In the course of the opinion in *Allegheny Pittsburgh Coal Co.*, this Court quoted as follows from the opinion in *Hillsborough Township v. Cromwell*, 326 U.S. 620, 623 (1946):

> " 'The equal protection clause . . . protects *the individual* from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.' " (Emphasis added.)

(488 U.S. 336, 345.)

In light of the foregoing authorities, it is rather too late in the day to argue, as Willowbrook does, that the Equal Protection Clause protects individuals from purposeful discrimination by the government only if that purposeful discrimination is based on the individual's membership in a "class" or "group."

And, of course, many lower federal courts have recognized that the Equal Protection Clause is violated when a state purposely discriminates against a "class of one." One of the first such decisions was authored by the eminent jurist, Learned Hand, in *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946), a case in which an architect alleged that building officials of the City of New York intentionally treated him differently from all other architects as a result of "personal hostility." (156 F.2d 791, 791.) Judge Hand considered the complaint to allege adequately the denial of equal protection of the laws, and Judge Hand considered that this Court's decision in

Snowden v. Hughes, 321 U.S. 1 (1944), "definitely settled it, that, if a complaint charges a state officer, not only with deliberately misinterpreting a statute against the plaintiff, but also with purposely singling out him alone for that misinterpretation, it is good against demurrer." (156 F.2d 791, 792.) See also *LeClair v. Saunders*, 627 F.2d 606, 609-610 (2d Cir. 1980), *cert denied*, 450 U.S. 959 (1981); *Ziegler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981); *Ciechon v. City of Chicago*, 686 F.2d 511, 522 (7th Cir. 1982); *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989); *Rubinovitz v. Rogato*, 60 F.3d 906, 911-912 (1st Cir. 1995); *Esmail v. Macrane*, 53 F.3d 176, 179-180 (7th Cir. 1995).

Amici curiae supporting Willowbrook cite *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), for the proposition that the Equal Protection Clause is not violated if the unequal treatment is "rationally related to a legitimate state interest." (*Amici's* brief, p. 11.) *Amici* have argued that Judge Posner's opinion in this case ruled that "otherwise perfectly rational government conduct that does not affect suspect classifications or fundamental rights violates the Equal Protection Clause if it is in fact motivated by some 'illegitimate animus.' " (*Amici's brief*, p. 9.) *Amici's* characterization of the opinion of the Court of Appeals for the Seventh Circuit in this case is blatantly false. The Court of Appeals in this case, quoting from its decision in *Esmail*, stated that the equal protection clause can be invoked by a person who can prove that " 'action taken by the State, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him *for reasons wholly unrelated to any legitimate state objective.*' " (Emphasis added.) (160 F.3d 386, 387.) The court stated

that the Amended Complaint in this case alleged that "ill will [was] the *sole* cause of the action of which the plaintiff complains." (Emphasis added.) (160 F.3d 386, 388.) The court also stated:

> "If the defendant would have taken the complained-of action anyway, even if it did not have the animus, the animus would not condemn the action; a tincture of ill will does not invalidate governmental action."

The Court of Appeals opinion, thus, clearly indicated that the plaintiff must prove that the action taken by the State was taken "for reasons wholly unrelated to any legitimate state objective," and, if the State action is taken "for reasons wholly unrelated to any legitimate state objective," it cannot be said to be "rationally related to a legitimate state interest." The Court of Appeals opinion unequivocally stated that an animus would not render state action unconstitutional if the state would have taken the action anyway. Judge Posner's opinion was completely consistent with this Court's decision in *City of New Orleans v. Dukes*, and how *amici* can argue to the contrary under these circumstances is unclear.

Willowbrook has similarly mischaracterized Judge Posner's opinion in this case to argue that, under the opinion, all that a person needs to show in order to establish a violation of his right to equal protection of the laws "is differential treatment and vindictiveness." (Willowbrook's brief, p. 27.) As noted above, however, the opinion also requires that the difference in treatment from others similarly situated be " 'wholly unrelated to any legitimate state objective.' " *Olech v. Village of Willowbrook*, 160 F.3d 386, 387.

Willowbrook argues that "[r]ecognition of the class-of-one equal protection claim will invite legions of claims into federal courts." (Willowbrook's brief, p. 24.) Willowbrook then presents to this Court a "parade of horribles" which it contends will follow from the "recognition" of this "new" cause of action. Willowbrook's arguments in this regard are not persuasive for several reasons. First, Willowbrook's arguments are based on Willowbrook's own mischaracterization of the opinion of the Court of Appeals in this case. More important, however, is the fact that this Court recognized the applicability of the Equal Protection Clause to a "class of one" in 1923 (*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923)), and the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, recognized the validity of the type of claim being asserted here in 1946 (*Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946)), and the unfortunate results predicted by Willowbrook have not occurred, and the Republic has managed to survive since then.

The choice of words used by Willowbrook to describe this Court's decision-making is troubling and somewhat enlightening in this regard. For example, Willowbrook refers to certain prior decisions of this Court as "this Court's recent attempts to limit access to the federal courts for redress" in certain types of cases. (Willowbrook's brief, p. 27.) One would think that this Court would be surprised to learn that in the prior cases, it had been "attempting to limit access to the federal courts," as opposed to discerning and explicating what the constitution and statutes require and applying them to the particular disputes that came before it. Willowbrook has cited

no case holding that it is a rule of constitutional interpretation that the constitution should be construed in a way that would limit access to the federal courts, or that would reduce litigation. It would be a surprise, indeed, to the framers of our constitution should that great charter of our liberties be subject to such a rule of construction.

Willowbrook has also argued that ill will or improper animus is not relevant to a claim of denial of the equal protection of the laws. That argument is without merit, at least outside the area of legislative classification. In order for a State to "deny" to a person the equal protection of the laws, the discrimination must be "intentional" or "purposeful." (*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923); *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 353.) Unequal treatment which is not intentional or purposeful is not a "denial" of the equal protection of the laws. As Judge Posner stated in this case, "uneven law enforcement," without more, is "constitutionally innocent." (160 F.3d 386, 388.) Accordingly, ill will or illegitimate animus, such as vindictiveness, is relevant to show that the unequal treatment is not accidental, but rather is intentional or purposeful. In arguing that ill will or illegitimate animus is not relevant to a claim of denial of the equal protection of the laws, Willowbrook has cited decisions in which claims have been made that classifications in *legislation* violated the Equal Protection Clause. Legislation, however, notwithstanding the claims of some humorists, is always volitional, purposeful, and intentional. Laws providing for classifications of people do not get passed by accident. Accordingly, in the field of legislation, the particular

motives or reasons animating the votes of particular legislators is constitutionally irrelevant because legislation is presumptively intentional and purposeful.

Judge Posner's opinion in the instant case was no innovation, but rather was required by long-standing precedent, and it should be affirmed.

This Court should decline to consider Willowbrook's arguments that Mrs. Olech was required to exhaust her state remedies in order to state a claim for the denial of her rights under the Equal Protection Clause, and that she failed to do so.

In its brief, Willowbrook has argued that Mrs. Olech failed "to avail herself of state remedies," and that this alleged failure "precludes a denial of equal protection." (Willowbrook's brief, p. 31.) Willowbrook never previously raised this issue in this case in the district court, in the Court of Appeals for the Seventh Circuit, or even in Willowbrook's Petition For A Writ Of Certiorari filed in this Court. Willowbrook's attempt to raise this question now is just one example of its approach to this case, which has been to attempt to raise new issues and arguments when it is procedurally improper to do so, and at each new stage of the proceedings. This Court should decline to consider Willowbrook's "exhaustion of state remedies" question because it is not the question on which certiorari was granted, nor is it a subsidiary question fairly included therein. (*Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30-31 (1993).) The question on which this Court granted certiorari is as follows:

> "A. Whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the Respondent did not allege membership in a vulnerable group, but that ill will motivated the government to treat her differently than others similarly situated."

(Petition For A Writ Of Certiorari, p. i.)

At best the issue of "exhaustion of state remedies" is complementary or related to the question on which this Court granted certiorari, and, as this Court stated in *Izumi*, "A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not ' "fairly included therein." ' [Citation omitted.]." 510 U.S. 27, 31-32.

This Court should also decline to consider Willowbrook's "exhaustion of state remedies" question because it was not raised in or considered by either of the courts below. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

Another reason why this Court should decline to consider Willowbrook's "exhaustion of state remedies" question is that, because Willowbrook failed to present this question at any point below, the facts bearing on the question were never developed, and there is no way to conclude, if there were a requirement of exhaustion of state remedies, whether Mrs. Olech did or did not exhaust her state remedies, or whether any particular state remedy would or would not have been effective under the particular facts and circumstances of this case. Mrs. Olech's Amended Complaint did not allege that she had failed to exhaust her state remedies, and because the district court decided this case pursuant to a motion to

dismiss under Fed.R.Civ.P. 12(b)(6), there are no facts in the record relating to the parties' dispute other than those alleged in the Amended Complaint. As stated in *GAF Corp. v. Transamerica Insurance Co.*, 665 F.2d 364, 368 (1981):

> "It is well established that appellate courts should avoid the consideration of defenses never raised in the trial court, [footnote omitted] for any such decision would be without the benefits of a developed factual record. [Footnote omitted.]"

Accordingly, this Court should decline to consider Willowbrook's argument that Mrs. Olech failed "to avail herself of state remedies," and that this alleged failure "precludes a denial of equal protection." (Willowbrook's brief, p. 31.)

A suitor under 42 U.S.C. §1983 alleging a violation of his rights under the Equal Protection Clause need not exhaust state remedies.

Should this Court elect to consider Willowbrook's "exhaustion of state remedies" question, it need not detain the Court long because this Court has already ruled at least three times that a person claiming a violation of his rights to equal protection of the laws need not exhaust his state remedies. (*McNeese v. Board of Education*, 373 U.S. 668, 674 (1963) (school desegregation); *Damico v. California*, 389 U.S. 416 (1967); *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

The cases relied on by Willowbrook involved, not claims of denial of equal protection of the laws, but rather claims of denial of due process of law. As stated in

Simmons v. Chemung County Department of Social Services, 770 F.Supp. 795, 799 (W.D.N.Y. 1991), *aff'd*, 948 F.2d 1276 (2d Cir. 1991), the rule that state remedies are generally irrelevant to the existence of a cause of action under §1983 "is inapplicable and exception exists . . . where . . . the plaintiffs allege claims based on violations of *procedural* due process." (Emphasis in original.) The court in *Simmons* continued, "For these claims, the existence of state remedies *is* relevant because the constitutional violation actionable under §1983 – the deprivation of a protected interest *without due process of law* – does not occur 'until and unless the State fails to provide due process.' [Citation omitted.]" (Emphasis in original.) (770 F.Supp. 795, 799.) The court in *Simmons* continued, "To determine whether a constitutional violation has occurred in these cases, 'it is [therefore] necessary to ask what process the State provided, and whether it was constitutionally adequate.' [Citation omitted.]" (770 F.Supp. 795, 799.) These considerations are not applicable to Mrs. Olech's claim that her rights under the Equal Protection Clause were violated.

This Court should decline to consider the arguments made by Willowbrook and *amici curiae* on its behalf to the effect that, even if the Equal Protection Clause protects a "class of one" from purposeful discrimination, the Amended Complaint in this case failed sufficiently to allege that the state action had no rational basis related to a legitimate state interest, and failed sufficiently to allege that Mrs. Olech was subject to unequal treatment which was intentional or purposeful, because this Court limited its grant of certiorari in this case to exclude the question of whether the conduct alleged in the Amended Complaint in this case is sufficient to state a cause of action on behalf of a "class of one," assuming that the Equal Protection Clause protects such individuals. In addition, Willowbrook waived these contentions by failing to raise them in its motion to dismiss and memorandum in support thereof in the district court where any alleged defect in the Amended Complaint might have been corrected by amendment.

In *Missouri v. Jenkins*, 495 U.S. 33 (1990), this Court considered, *inter alia*, a petition for certiorari filed by the State of Missouri in a school desegregation case. The State's petition "argued that the remedies imposed by the District Court were excessive in scope and that the property tax increase [ordered by the district court] violated Article III, the Tenth Amendment, and principles of federal/state comity." (495 U.S. 33, 45.) This Court granted the State's petition "limited to the question of the property tax increase." (495 U.S. 33, 45.) In its brief on the merits, the State argued that the funding ordered by the district court violated principles of equity and comity because the remedial order, itself, was excessive. This Court refused to consider the State's argument to that effect, stating:

> "We think this argument aims at the scope of the remedy rather that the manner in which the remedy is to be funded and thus falls outside our limited grant of certiorari in this case. As we denied certiorari on the first question presented by the State's petition, which did challenge the scope of the remedial order, we must resist the State's efforts to argue that point now."

(495 U.S. 33, 53.)

This case presents a similar situation. The Petition For A Writ Of Certiorari filed in this case presented the following two questions for review:

> "A. Whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the Respondent did not allege membership in a vulnerable group, but that ill will motivated the government to treat her differently than others similarly situated.
>
> B. Whether the government conduct alleged in Respondent's First Amended Complaint meets the standard to state a cause of action on behalf of a 'class of one,' assuming the Equal Protection Clause protects such individuals."

(Petition For A Writ Of Certiorari, p. i.)

It was in the Petitioners' argument on Question B that the Petitioners argued that a complaint cannot survive a motion to dismiss "[w]here a rational basis for the government conduct emerges from the allegations of the complaint," and that "[h]ere, the allegations of Respondent's Amended Complaint reveal there to be a rational basis for Petitioners' conduct." (Petition For A Writ Of Certiorari, p. 18.) In the instant case, this Court granted

the petition for a writ of certiorari, but the grant was limited to the first question presented by the petition. Under these circumstances, this Court, as in *Missouri v. Jenkins*, should resist the Petitioners and *amici's* attempt to argue the question on which this Court denied certiorari and should decline to consider the arguments that the allegations of the Amended Complaint in this particular case failed sufficiently to allege that the government conduct was not rationally related to a legitimate government interest. This Court should also decline to consider for this reason Willowbrook's argument that the Amended Complaint in this case failed sufficiently to allege that Mrs. Olech was subject to unequal treatment which was intentional or purposeful. (Willowbrook's brief, pp. 17-18)

This Court should also decline to consider the foregoing arguments because they were not made in the Petitioners' Motion To Dismiss Plaintiff's Amended Complaint (App. 14-26) or their Memorandum Of Law In Support Of Motion To Dismiss (App. 27-35) in the district court where, had they been raised, Mrs. Olech might have sought to amend her pleading to correct any alleged defect in that regard. *See GAF Corp. v. Transamerica Insurance Co.*, 665 F.2d 364, 368 (D.C.Cir. 1981) (appellate courts should avoid consideration of defenses not raised in the trial court because decision would be without the benefit of developed factual record).

The Amended Complaint in the instant case adequately alleged that there was no rational basis related to a legitimate state interest for the unequal treatment of Mrs. Olech, and that Mrs. Olech was subject to unequal treatment which was intentional or purposeful.

Should this Court decide to consider the arguments of Willowbrook and its *amici* to the effect that the Amended Complaint in the instant case failed sufficiently to allege that the unequal treatment of Mrs. Olech had no rational basis related to a legitimate State interest, those arguments should be rejected. Grace Olech's Amended Complaint was dismissed under Fed.R.Civ.P. 12(b)(6) for "failure to state a claim upon which relief can be granted." As this Court stated in *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984):

> "At this stage of the litigation, we must accept petitioner's [the plaintiff's] allegations as true. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

Accordingly, dismissal under this theory, which Willowbrook did not raise in its Motion To Dismiss Plaintiff's Amended Complaint (App. 14-26) or its Memorandum Of Law In Support Of Motion To Dismiss (App. 27-35), would have been proper only if there was no set of facts consistent with the allegations of the Amended Complaint under which it could be concluded that there was no rational basis related to a legitimate state interest for the unequal treatment of Mrs. Olech.

The Amended Complaint alleges that in the state court lawsuit, the plaintiffs, including Mrs. Olech, sought

damages from Willowbrook as a result of the flooding of the plaintiffs' property by stormwater. (App. 5) The Amended Complaint alleges that the unequal treatment occurred while that state court lawsuit was pending. (App. 5, 9) The Amended Complaint alleges "[t]hat the Defendants treated Plaintiff GRACE OLECH and Thaddeus Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the *detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit*, by the use of ditches and swales along Tennessee Avenue." (Emphasis added.) (App. 10) The Amended Complaint alleges that Willowbrook demanded the 33-foot easements and the 66-foot street dedication as a condition of the extension of the water main (App. 9) for which the Olechs and the other plaintiffs in the state court lawsuit had already paid. (App. 8) Willowbrook did not propose to pay anything for the private property rights which Willowbrook was demanding. (See U.S. Const., Amend. V.) The Amended Complaint alleges "[t]hat the decision by the Defendants to treat Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot street dedication as a condition for the extension of the water main *was irrational and wholly arbitrary*, and, on information and belief,

was made by the appropriate policy-making official or employee of Defendant VILLAGE OF WILLOWBROOK." (Emphasis added.) (App. 10) All of the foregoing allegations must be accepted as true.

In light of the foregoing allegations, it is difficult to understand how Willowbrook and its *amici* can argue that there was a rational basis related to a legitimate state interest for the unequal treatment of Mrs. Olech. Is it a legitimate state interest to extort private property rights from a homeowner as a condition of receiving running water, which private property rights are not required of others as a condition of receiving running water? What if Willowbrook, instead of demanding the private property rights that it did, had simply chosen to charge Mrs. Olech twice as much per gallon of water as it charged everybody else? Would that have been rationally related to a legitimate state interest? In this regard, it should be borne in mind that if Willowbrook had taken the private property rights by eminent domain, it would have had to pay the owners for those rights. (U.S. Const., Amend V.) Is it rationally related to a legitimate State interest for the government to demand private property rights as a condition of receiving running water that are not demanded of others so that the government can control stormwater drainage "to the detriment" of citizens who had the temerity to sue the government for flooding their properties? It seems rather clear that, in the instant case, it can be concluded in a manner consistent with the allegations of the Amended Complaint, that the unequal treatment of Mrs. Olech was not supported by a rational basis related to a legitimate state interest.

Willowbrook and its *amici* argue that Willowbrook's desire to improve the roadway provides a rational basis for its conduct. This argument is without merit, however. The question is not whether it was rational in the abstract for Willowbrook to demand the 33-foot easements and 66-foot street dedication for public purposes. The question is whether it was rationally related to a legitimate state interest for Willowbrook to demand those private property rights as a condition of Mrs. Olech and the other plaintiffs in the state court lawsuit receiving running water when such property rights were not demanded as a condition of others receiving running water, and where the easements and dedication were not required for installation and maintenance of the water main. This proposed rationalization of Willowbrook's conduct in this case would be similar to the taxing authorities in *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), claiming that there was a rational basis related to a legitimate State interest to assess the bridge company's property at 100 percent of its value because that is what the property was worth. What is required is not a rational basis related to a legitimate state interest for the government action in the abstract, but a rational basis related to a legitimate state interest for the unequality in treatment. Willowbrook has suggested no such rational basis consistent with the allegations of the Amended Complaint. In this regard, it should be noted that the letter which Willowbrook included in the Appendix to its brief is not part of the court record, and, therefore, cannot be considered by this Court. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, n. 16 (1970).

Willowbrook also argues that "[a]t worst, Respondent was a random victim of governmental error," and that a violation of equal protection will not lie when the governmental action was taken out of error, neglect, or mistake. (Petitioners' brief, p. 34.) The problem with Willowbrook's argument in this regard is that it is contradicted by the allegations of the Amended Complaint, which must be accepted as true, and which state that the reason for the disparate treatment was ill will resulting from the state court lawsuit. (App. 10) If something is done out of "ill will," it is done purposely and intentionally, and not by mistake.

Willowbrook has also argued, without citing any authority, that "[t]he plaintiff should also be held to a pleading standard that would require factual support of allegations that similarly situated persons were treated differently," and that Mrs. Olech's Amended Complaint was somehow deficient in that regard. (Willowbrook's brief, pp. 34-35.) First, it is submitted that the Amended Complaint adequately alleged that Mrs. Olech and the other state court plaintiffs were treated differently from others similarly situated. (App. 9-10.) The Village Attorney as much as admitted that fact. (App. 10) But, more importantly, at some point in the appellate process, Willowbrook must be stopped from offering new theories and arguments. Even if this Court had not explicitly denied certiorari on Willowbrook's second question presented in its Petition For A Writ Of Certiorari, this argument would not be a subsidiary question to the question on which certiorari was granted, nor would it be fairly

included therein. Accordingly, it should not be considered. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30-31 (1993).

Willowbrook's *amici*, as did Willowbrook, argue that Willowbrook's desire to construct and maintain a roadway, including pavement, sidewalks, and public utilities, provides a rational basis related to a legitimate State interest for its conduct. (*Amici's* brief, pp. 16-17.) That argument was addressed above. The question is not whether the government's conduct had a rational basis related to a legitimate State interest in the abstract, but whether the unequality in treatment was rationally related to a legitimate State interest. *Amici* argue that Willowbrook might have believed that the additional improvements were necessary and desirable for any number of reasons, and that it was less disruptive to the residents of Tennessee Avenue and other users of the road, and more cost effective, to install water main connections, pave the road, and install sidewalks at one time rather than sequentially. (*Amici's* brief, p. 17.) While that statement is certainly true, and would have justified Willowbrook in commencing eminent domain proceedings to take the private property for public use (U.S. Const., Amend. V), it would not have justified Willowbrook in demanding the private property rights that it did as a condition of the plaintiffs in the state court lawsuit receiving running water when such private property rights were not demanded as a condition of others receiving running water, and where the easements were not required for installation and maintenance of the water main.

Amici argue that Willowbrook's desire to control stormwater drainage in the vicinity provides a rational basis related to a legitimate State interest for Willowbrook's conduct. (*Amici's* brief, pp. 16-17.) That argument is subject to the same infirmity as that discussed above. It should be noted in this regard, however, that the Amended Complaint did not just allege that Willowbrook desired to control stormwater drainage in the vicinity, but rather that Willowbrook was attempting "to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue." (App. 10) *Amici* have not explained how directing additional storm water onto the properties of the plaintiffs in the state court lawsuit was rationally related to a legitimate State interest.

Amici also argue that Mrs. Olech's Amended Complaint failed to allege that she was treated differently from others similarly situated because it alleged that Willowbrook demanded a 33-foot easement, not just from her and the other plaintiffs in the state court lawsuit, but also from the property owners on the east side of Tennessee Avenue. (*Amici's* brief, pp. 18-19.) What this argument has to do with the question on which this Court granted certiorari is, to put it charitably, very obscure, and this Court should decline to consider it on that basis alone. (*See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30-31 (1993).) In any event, *amici's* argument in this regard is without merit. There are no homes on the east side of Tennessee Avenue across from Mr. Brinkman, the Olechs, and the Zimmers, nor does the

Amended Complaint allege that there are. The homes to the east of the Olechs, the Zimmers, and Mr. Brinkman are not on Tennessee Avenue but are all the way over on the next street to the east, Clarendon Hills Road, and in the spring of 1995, those homes already had municipal water. (App. 47.) The Amended Complaint is not to the contrary. What the Amended Complaint alleged was that the defendants demanded the 33-foot easements and 66-foot street dedication as a condition of extending the water main at the request of the Olechs, the Zimmers, and Howard Brinkman, all plaintiffs in the state court lawsuit, that *their* homes be hooked up to the municipal water supply. (App. 8-9) In effect, Willowbrook told the Olechs, the Zimmers, and Howard Brinkman that they would not get municipal water unless and until they granted the 33-foot easements and obtained such easements from the property owners across the street who already had municipal water. Willowbrook's unequal treatment was of the plaintiffs in the state court lawsuit, and not anyone else.

Willowbrook has also argued that the Amended Complaint in this case failed sufficiently to allege that Mrs. Olech was subject to unequal treatment which was intentional or purposeful. (Willowbrook's brief, pp. 17-18.) In this regard, Willowbrook relies on this Court's decision in *Snowden v. Hughes*, 321 U.S. 1 (1944). Willowbrook's argument is not well taken. In *Snowden*, the plaintiff had alleged that he had been denied the equal protection of the laws when the State Primary Canvassing Board failed to follow a state law requiring the board to certify for the general election two Republican candidates and one Democratic candidate. The plaintiff in *Snowden*

was the Republican candidate who came in second. The plaintiff in *Snowden* did not allege that the law requiring two Republican candidates to be certified had been followed in all other cases. As this Court stated, "So far as appears the Board's failure to certify petitioner was unaffected by and unrelated to the certification of any other nominee." (321 U.S. 1, 10.) The petitioner in *Snowden* had alleged that the Board's failure to certify him was "willful" and "malicious," but this Court held that, although that was enough to allege an intentional deprivation of the plaintiff's right to be certified under State law, it was not enough to allege "purposeful discrimination." (321 U.S. 1, 10.) This Court stated:

> "If the action of the Board is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. . . . A state statute which provided that one nominee rather than two should be certified in a particular election district would not be unconstitutional on its face and would be open to attack only if it were shown, as it is not here, that the exclusion of one and the election of another were invidious and purposely discriminatory."

(321 U.S. 1, 11.)

Snowden does not support Willowbrook's claim that the Amended Complaint in the instant case is insufficient to allege that Mrs. Olech was subjected to unequal treatment which was intentional or purposeful. Here, the Amended Complaint alleged that Willowbrook's demands for the 33-foot easements and the 66-foot street dedication "as a condition of the extension of the water main were not consistent with the policy of Defendant

VILLAGE OF WILLOWBROOK regarding other property in the Village of Willowbrook" (App. 9-10), that "Defendant VILLAGE OF WILLOWBROOK and its officers and employees, including PHILIP J. MODAFF, and, on information and belief, Defendant GARY PRETZER," harbored ill will against the plaintiffs in the state court lawsuit as a result of that lawsuit and the prior refusal of the Olechs and Howard Brinkman to provide Willowbrook with certain drainage easements (App. 6), and that "the Defendants treated Plaintiff GRACE OLECH and Thaddeus Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue" (App. 10). The foregoing allegations do much more than state that Willowbrook's demands were "willful" and "malicious" as in *Snowden*; here the allegations clearly and unequivocally allege "purposeful discrimination." Accordingly, Willowbrook's argument in this regard should be rejected.

CONCLUSION

For the reasons stated herein, the Respondent, Grace Olech, respectfully requests that this Court dismiss the writ of certiorari in this case as improvidently granted,

or, in the alternative, affirm the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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(9)

No. 98-1288

In The

Supreme Court of the United States

VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of the VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of the VILLAGE OF WILLOWBROOK,

Petitioners,

v.

GRACE OLECH,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF OF THE PETITIONERS

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QUESTION PRESENTED

Whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the claimant does not allege membership in a class or group, but asserts that vindictiveness motivated the government to treat her differently than others similarly situated.

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Respondent Chose to Bring Her Action Pursuant to the Class-of-One Equal Protection Theory

The Solicitor General argues that Respondent's Amended Complaint states a claim under the First Amendment, but cites for support of this proposition case law concerning First Amendment claims raised by public employees punished for speaking out on matters of public concern. *See, e.g., Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). In none of the cases cited by the Solicitor General was the First Amendment the basis for a claim of retaliation for filing a lawsuit. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), involved punishment of an employee for engaging in union-related activities. *Wayte v. United States*, 470 U.S. 598 (1985), was a selective enforcement case and such cases have always been analyzed according to equal protection standards, *see Oyler v. Boles*, 368 U.S. 448 (1962). *Police Department v. Mosley*, 408 U.S. 92 (1972), merely holds that differential treatment of picketers can violate the Equal Protection Clause.

Bill Johnson's Restaurant, Inc. v. NLRB, 461 U.S. 731 (1983), held that an employer's filing of a state court libel suit against its employees was not an enjoinable unfair labor practice unless the suit was filed for retaliatory purposes and lacked a reasonable basis. If the same rationale were applied to this case, Respondent would have to establish the lack of a "reasonable basis" for Petitioners' alleged retaliatory conduct. The reasonable basis for Petitioners' request for the easement is found in Respondent's allegation that the Village held no rights over

Tennessee Avenue and therefore without the easement had no right to install the water main requested by the Respondent. J.A. 8-9.

California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508 (1972), involved allegations that petitioners used their power, strategy and resources to deny respondent's access to administrative and judicial proceedings. 404 U.S. *at* 511. Here, Respondent was not denied access to the state court; rather, she prevailed in her action there. J.A. 5.

If Respondent's claim of retaliation for filing a lawsuit is indeed a First Amendment based claim, it is of a breed not yet endorsed by this Court. If this Court is to give its approval to a First Amendment claim for retaliation for filing a lawsuit, it should not do so in a case where the plaintiff has never asserted the First Amendment as a basis for recovery and the parties have not presented the issue to the Court.

The Respondent never asserted the First Amendment claim as a basis for recovery in any of the complaints filed in this case and has never, in any court, requested leave to amend the Complaint to add such a claim. Respondent chose to proceed pursuant to the *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), doctrine which, the Solicitor General agrees, allows allegations of improper motive to overcome a "rational basis" defense. (Brief of *Amicus Curiae*, Solicitor General, *at* pp. 12-13.) The Respondent is the master of her Complaint and as such has chosen not to proceed under the First Amendment. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 409 (1988). Since the case has proceeded through the

District Court and the Circuit Court of Appeals on the equal protection theory, it would serve no purpose at this point to render the efforts of those courts meaningless by allowing a shift in theories. Permitting such an amendment would also prejudice the Petitioners since Respondent had been in possession of facts which theoretically gave rise to what the Solicitor General believes to be a First Amendment claim since the inception of this case. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387-88 (9th Cir. 1990) (affirming the denial of a motion for leave to amend the complaint to add new legal theories because of prejudice to defendants since plaintiff had been in possession of facts giving rise to new legal theory for eight months). The denial of a motion to amend a complaint is not an abuse of discretion where the movant presents no new facts, but only new theories and provides no satisfactory explanation for his failure to fully develop his contentions in the original complaint. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). The denial of a motion to amend is also appropriate where, as here, a plaintiff previously has been granted leave to amend the complaint. *Griggs v. Pace American Group, Inc.*, 170 F.3d 877, 879 (9th Cir. 1999).

In *Albright v. Oliver*, 510 U.S. 266, 275 (1994), this Court was presented with a malicious prosecution complaint which alleged a violation of substantive due process under the Fourteenth Amendment. This Court concluded that substantive due process could not support a malicious prosecution claim, but recognized the potential applicability of the Fourth Amendment to petitioner's claim. Despite such recognition, this Court expressed no view as to whether petitioner's claim would have succeeded under the Fourth Amendment. It is true that in

the instant case the Plaintiff is the Respondent, not, as in *Albright*, the petitioner who failed to raise the Fourth Amendment issue in the petition for writ of certiorari. Yet, as the master of the Complaint, the Respondent has chosen not to proceed on a First Amendment theory and has not asked this Court to consider whether she may do so. Thus, this Court need express no opinion in this case as to whether the Respondent's claim would succeed under the First Amendment.

The same is true for the Solicitor General's contention that Respondent could claim membership in a class of persons who had sued the Village of Willowbrook in the 1989 lawsuit. Respondent chose to proceed under the *Esmail* doctrine, asserting that ill will motivated Petitioners to treat Respondent differently. The case was analyzed by the lower courts under the *Esmail* doctrine and this Court granted the Petition for Writ of Certiorari to consider the viability of the class-of-one theory. Respondent has neither raised the multiple-member-class issue before this Court nor sought leave to amend her Complaint to do so. This Court may decline the Solicitor General's invitation to analyze the Complaint under a theory never advanced by the Respondent. *Albright v. Oliver*, 510 U.S. 266, 275 (1994).

Moreover, the "class" from whom Petitioners sought property for the easement included members not alleged to have sued the Village. Paragraph 25 alleges that "property owners on the other side of Tennessee Avenue" were asked for a thirty-three-foot easement to create a sixty-six-foot wide dedicated street. J.A. 9. There is no allegation in the Amended Complaint that the "property owners on the other side of Tennessee Avenue" sought

connection to the municipal water system. The allegation that property owners who had not previously sued the Village were asked for thirty-three feet of property to dedicate the road establishes that Petitioners did not seek to take action solely against a class whose members sued the Village, and demonstrates the rational nondiscriminatory basis for Petitioners' request: to dedicate an existing road so that it could secure the right to install a public improvement along it. Even if the facts are analyzed under a multiple-member-class approach, dismissal of the Complaint is justified by the rational basis defense. *Central State University v. American Association of University Professors*, 119 S.Ct. 1162, 1163 (1999).

Dismissal of the Writ of Certiorari, as Urged by the Solicitor General, Would Allow the Erroneous Decision of the Seventh Circuit Court of Appeals to Stand as Precedent

The Respondent's Amended Complaint and the opinion of the Seventh Circuit Court of Appeals provide this Court the necessary framework to analyze the class-of-one equal protection theory. It was the theory asserted by the Respondent in the lower courts and the Court of Appeals applied the *Esmail* precedent to the facts set forth in the Amended Complaint.

While the Solicitor General argues in favor of dismissal of the Writ of Certiorari, such dismissal would leave in place an opinion which, the Solicitor General agrees, is clearly erroneous. Even if this case did not present the proper framework for consideration of the class-of-one issue, the Court of Appeals' erroneous application of equal protection law is ample reason for this

Court to consider this case. The Solicitor General correctly observes that the existence of any conceivable rational basis for Petitioners' attempt to obtain a thirty-three-foot easement for the dedication of the road would defeat Respondent's equal protection claim. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Such a rational basis is found in the fact that the Village needed the easement to dedicate an existing road over which it had no right to construct a public improvement. Yet, as pointed out by the Solicitor General, "under the Court of Appeals' approach, virtually any objectively legitimate decision by any government actor at any level can be transformed into a potential equal protection violation if a person affected by the decision alleges that the government acted with a malicious motive." (Brief of *Amicus Curiae*, Solicitor General, *at* p. 19.) Such an approach clearly contradicts this Court's decisions that improper motivation will not salvage an equal protection claim where a rational basis supports the government's action. *United States R.R. Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980); and *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Irrespective of the Solicitor General's claim that Respondent was a member of an identifiable class, the facts alleged in the Amended Complaint provide this Court with a sufficient basis to analyze and reverse the decision of the Court of Appeals.

Petitioners Did Not Waive the Fourteenth Amendment Class-of-One Issue Since It Was Presented in the Petition for Writ of Certiorari and this Court Granted the Writ on That Issue

This Court granted the Petition for Writ of Certiorari on the issue of whether the Equal Protection Clause of the Fourteenth Amendment protected a class of one. Respondent cites *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981) and *United States v. Ortiz*, 422 U.S. 891 (1975) for the proposition that issues not raised before the Court of Appeals are not properly before this Court following the granting of a petition for writ of certiorari. In the cases cited by Respondent, however, the issue which this Court declined to consider was not the issue upon which it granted review. In *Delta Airlines, Inc.*, the Court granted certiorari on the issue of whether the words "judgment finally obtained by the offeree" as used in Rule 68 should be construed to encompass a judgment against the offeree as well as a judgment in favor of the offeree. This Court then declined to consider the question of whether the district judge abused his discretion in denying defendants' costs under Rule 54(d) because that issue had not been raised in the Court of Appeals. Similarly, in *Ortiz*, the issue which this Court declined to consider concerned the alleged retroactive application of the precedential case, an issue upon which this Court did not grant certiorari.

The fact that the issue of the propriety of a class-of-one cause of action was not raised in the courts below does not preclude this Court's consideration of the issue. This court has decided cases on grounds that were not only not raised in the courts below, but not presented in

the petition for writ of certiorari. *See, e.g., Teague v. Lane*, 489 U.S. 288, 300 (1989). In *Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1990), the Court decided a case on an issue that was not only not raised in the lower courts, but never mentioned in the petition for writ of certiorari or during oral argument before the Court. In *McCleskey v. Zant*, 499 U.S. 467 (1991), this Court decided a case on a question which the parties had not argued in the courts below.

In the Petition for Writ of Certiorari, Petitioners identified the conflict among the Courts of Appeals on the issue of whether the Equal Protection Clause of the Fourteenth Amendment protected a class of one. (Petition for Writ of Certiorari, pp. 6-8.) Petitioners submit that where the basis for this Court's review is the resolution of a conflict between or among the Circuit Courts of Appeals, the fact that a specific request to overrule an earlier decision was not made in the lower courts should not foreclose this Court's review of the issue. It is reasonable for parties to accept the law of the circuit and proceed within the framework of the existing law before petitioning this Court to resolve a conflict between the circuits. Indeed, the District Court in this case was bound by *stare decisis* to follow the Seventh Circuit Court of Appeals' decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). In their brief to the Seventh Circuit Court of Appeals, however, Petitioners did bring to the attention of the Court the fact that the *Esmail* doctrine had been considered and rejected in other circuits. J.A. 149-150. *Edwards v. City of Goldsboro*, 981 F.Supp. 406, 410 (E.D.N.C. 1997); *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996); and *Dubuc v. Green Oak Township*, 958 F.Supp. 1231, 1236-37 (E.D.Mich. 1997).

The Courts of Appeals Continue to Interpret the Equal Protection Clause to Require Allegations of Class Membership to Support Claims Brought Thereunder

Petitioners acknowledge this Court's holdings in *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 366 (1989), and *McFarland v. American Sugar Refining Co.*, 241 U.S. 79 (1916), and the application of the Equal Protection Clause to those claims. None of those cases, however, involved a direct challenge to the assumption that an equal protection claim need not be supported by class membership. Those holdings stem from the long-standing recognition that corporations fall within the scope of the Equal Protection Clause. *See, e.g. Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394, 396 (1886). Implicit in those holdings was the recognition that corporations are a class subject to differential treatment by governments.

Amicus Curiae the ACLU cites *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) in support of its argument that the Equal Protection Clause recognizes a class of one. *Nixon*, however, did not involve a class-of-one claim brought under the Equal Protection Clause. When this Court spoke of a class of one in *Nixon*, it did so in the context of the specificity element of the bill of attainder law. It concluded that the specificity needed to constitute a bill of attainder was not satisfied because, given the unique circumstances jeopardizing the preservation of President Nixon's records, he fell into a legitimate class of one thereby providing Congress a proper basis for enacting a law designed to protect those records. Petitioners assert that *Nixon* does not stand as precedent for the recognition of a class of one under the Equal Protection Clause.

Respondent's assertion that this Court resolved the class-of-one equal protection issue in *Sioux City* and *Allegheny* cannot be reconciled with this Court's more recent observation in *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) that:

> 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.

This explanation was again expressed by Justice Brennan in his concurring opinion in *Clements v. Fashing*, 457 U.S. 957, 979 (1982):

> And it has always been my understanding that " '[e]qual protection' . . . emphasizes disparity in treatment by a State between classes of individuals," in contrast to " '[d]ue process,' " which "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." *Ross v. Moffitt*, 417 U.S. 600, 609, 94 S.Ct. 2437, 2443, 41 L.Ed.2d 341 (1974). Accordingly, our equal protection cases have always assessed the legislative purpose in light of the class as the legislature has drawn it, rather than on the basis of some judicially drawn subclass for which it is possible to posit some legitimate purpose for discriminatory treatment. 457 U.S. *at* 979.

The Circuit Courts of Appeals have interpreted this Court's observations regarding the Equal Protection Clause as requiring that class membership be established

to state an equal protection claim. *Barren v. Harrington*, 152 F.3d 1193, 1194-95 (9th Cir. 1998) (to state a claim under 42 U.S.C. §1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class); *Bass v. Robinson*, 167 F.3d 1041, 1050 (6th Cir. 1999) (because plaintiff failed to allege invidious discrimination based upon his membership in a protected class, his equal protection claim fails at the inception); and *Herro v. City of Milwaukee*, 44 F.3d 550, 552 (7th Cir. 1995). The lack of uniformity in interpretation of the Equal Protection Clause, particularly in light of *Sioux City* and *Allegheny*, emphasizes the need for this Court's review and resolution of the issue. Such review will be this Court's first on the issue of the correct application of the Equal Protection Clause to claimants constituting a class of one.

The Rational Basis and Exhaustion Issues are Subsumed by the Equal Protection Issue Upon Which This Court Granted the Writ of Certiorari

Respondent correctly asserts that this Court granted the Petition for Writ of Certiorari on the issue of whether the Equal Protection Clause protected a class of one. It is submitted by Petitioners, however, that this Court's exploration of that issue may lead to a comprehensive definition of such a cause of action, including the effect, if any, that a rational basis for the government conduct may have on the claim. Should this Court recognize a class-of-one cause of action, a demonstrated rational basis for Petitioners' conduct may be deemed by this Court as a

complete defense to such a claim. Thus, the rational basis issue is subsumed by the equal protection issue upon which this Court granted certiorari. *See, e.g., Teague v. Lane*, 489 U.S. 288, 300 (1989).

The issue of exhaustion is also properly before this Court as it is related to the issue upon which the Petition for Writ of Certiorari was granted. If the Court fashions a cause of action for a class of one under the Equal Protection Clause, exhaustion of state remedies may play a role in such a claim.

Petitioners acknowledge that this Court's current decisions do not require an exhaustion of state remedies as a prerequisite to the filing of an equal protection claim. The same was true, however, for procedural due process claims before *Hudson v. Palmer*, 468 U.S. 517 (1984) and Fifth Amendment takings cases before *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Petitioners submit that the same rationale supporting *Hudson* and *Williamson* applies to equal protection claims. Ample remedies exist in the state court to redress the grievances of class-of-one claimants.

Respondent sees Petitioners' characterization of recent decisions by this Court as a reflection of its "attempts to limit access to the federal courts for redress of certain types of cases" as offensive. (Respondent's Brief, p. 27.) There can be no doubt, however, that this Court's decisions in *Hudson v. Palmer*, 468 U.S. 517 (1984) and *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), have had the effect of barring from federal court claims which previously had been brought there. Indeed, the body of

law falling under the label "our federalism" clearly reflects this Court's recognition that state courts are appropriate forums for claims previously confined to federal court. *See, e.g., Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981).

Respondent's attempt to characterize Petitioners' actions as unsupported by a rational basis is unpersuasive. It is argued that the Village had no rational reason to "extort private property rights from a homeowner as a condition of receiving running water, which private property rights are not required of others as a condition of receiving running water." (Respondent's Brief, p. 38.) This characterization loses sight of the crucial fact that distinguishes this case from any typical request for municipal water. Paragraph 22 of the Amended Complaint alleges that the Village had no rights or authority of any kind over Tennessee Avenue. J.A. 8-9. Thus, the Village of Willowbrook could not deliver water to the Respondent, or her neighbors, over land it did not own and had no right to possess or maintain. Hence, the request was made for sufficient land to dedicate a road which was already in existence, but over which the Village had no right of any kind.

The Village's lack of ownership of the road is a fact which defeats Respondent's equal protection claim for two reasons. First, it places the Respondent in the unique position of requesting a water main to be placed along a road over which the municipality had no ownership right. Respondent has not alleged that others who lived adjacent to non-dedicated roads and who made requests for municipal water were also not asked for an easement of sufficient width to dedicate the road. Secondly, the lack

of ownership of the road rendered Petitioners' request for the thirty-three feet rational; it was to dedicate an existing road and establish the government's right to install a water main along that road. Obtaining a full dedication of the road would also allow the municipality to maintain the road by plowing it and filling in potholes. Such efforts are clearly related to legitimate government objectives. Dedication and maintenance of the road would not be for the benefit of the municipality, but for those who would use the road, most often, it would seem, the Respondent herself. Petitioners did not request the easement to create a road and fulfill a municipal need; the road was already in existence and Petitioners simply desired to establish the Village's right to install the water line and then keep the road in proper repair.

The request for a thirty-three-foot easement was also rational and can be easily explained. In Illinois, the dedication for a road is typically sixty-six feet. *See, e.g., Tucker v. Bunger*, 108 Ill.App.3d 227, 229, 439 N.E.2d 488, 489 (1992); *People Ex. Rel Thomas v. Village of Sleepy Hollow*, 94 Ill.App.3d 492, 418 N.E.2d 466, 467 (1981); *Machalek v. Village of Midlothian*, 116 Ill.App.3d 1021, 452 N.E.2d 655, 656 (1983); and *Shields v. Ross*, 158 Ill. 214, 224-25, 41 N.E. 985, 988 (Ill. 1895). Thus, when the Village sought to establish its rights so that it could proceed with the water main installation, it naturally sought the sixty-six feet necessary for a dedication of the road. Since Respondent lived on one side of that road, thirty-three feet of her property, beginning from the middle of the already existing road, was not an unusual request. Such a request was consistent with the original deed for Respondent's property which subjected the thirty-three feet along Tennessee

Avenue to the right of public travel. *See* Appendix to Petitioners' Brief *at* p. 1.

CONCLUSION

Wherefore, Petitioners pray that this Court will enter its Order reversing the decision issued by the Seventh Circuit Court of Appeals.

Respectfully submitted,

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December 30, 1999

No. 98-1288

In the Supreme Court of the United States

VILLAGE OF WILLOWBROOK, ET AL., PETITIONERS

v.

GRACE OLECH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE JUDGMENT

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QUESTION PRESENTED

Whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the plaintiff does not allege discrimination based on membership in a vulnerable group, but alleges that ill will motivated the government to treat her differently from others similarly situated.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE JUDGMENT

INTEREST OF THE UNITED STATES

The question presented in this case is whether the Equal Protection Clause of the Fourteenth Amendment gives rise to a cause of action on behalf of a "class of one" where the plaintiff does not allege discrimination based on membership in a vulnerable group, but alleges that ill will motivated the government to treat her differently from others similarly situated. The United States has a substantial interest in the resolution of that question because federal employees are frequently sued for alleged constitutional violations under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

STATEMENT

1. Respondent Grace Olech lives in the Village of Willowbrook, Illinois. J.A. 4, 6. Respondent, her husband, and three of their neighbors filed suit in state court against the Village seeking monetary relief for damage to their property caused by stormwater flooding. J.A. 5. One of the plaintiffs failed to prosecute the action, but respondent and the other state court plaintiffs ultimately prevailed in the litigation against the Village and obtained damage awards. *Ibid.*

While the state court litigation was pending, the well on respondent's property became damaged beyond repair. J.A. 7. As a temporary solution, respondent obtained water from the well of one of her neighbors. Because that solution left respondent without a reliable source of water, however, respondent asked Village officials to hook her up to the municipal water system. J.A. 8. The other state court plaintiffs made a similar request. *Ibid.* Village officials told respondent and the other state court plaintiffs that the Village would not accede to that request unless respondent, the other state court plaintiffs, and the property owners on the other side of the street from them each dedicated a 33-foot easement for the construction and maintenance of a 66-foot dedicated street. J.A. 9. Respondent and the other state court plaintiffs refused to grant the 33-foot easement. J.A. 10-11.

After a three-month delay, the Village withdrew its request for a 33-foot easement and instead asked for a 15-foot easement. J.A. 11. In a letter, the Village's attorney stated that the request for a 15-foot easement was "consistent with Village policy regarding all other property in the Village." J.A. 10. Respondent and the

other state court plaintiffs agreed to grant the 15-foot easement. J.A. 11.

Before work on the water project could be completed, the hose respondent had used to obtain water from her neighbor's well froze. J.A. 12. Respondent and her husband went without water for more than four months. *Ibid.*

2. In 1997, respondent filed suit in federal district court against the Village and several of its officials (petitioners), alleging that petitioners had violated her rights under the Equal Protection Clause. J.A. 1-13. In particular, respondent alleged that, by demanding a 33-foot easement as a condition for receiving water from the Village, petitioners had treated respondent and the other state court plaintiffs differently from all other Village property owners. J.A. 10. Respondent further alleged that the difference in treatment was motivated by "ill will generated by the state court lawsuit." *Ibid.* In particular, the complaint alleged that the suit received substantial press coverage that made petitioners "look bad." J.A. 6. Respondent also alleged that petitioners' treatment of the state court plaintiffs was "irrational and wholly arbitrary." J.A. 10. Respondent sought damages for the harm suffered during the period she and her husband were without water. J.A. 12-13.

The district court granted petitioners' motion to dismiss the complaint for failure to state a claim upon which relief could be granted. J.A. 60-67. The district court ruled that, under the Seventh Circuit's decision in *Esmail* v. *Macrane*, 53 F.3d 176 (1995), respondents' allegations were insufficient to establish a violation of the Equal Protection Clause, because respondent had failed to allege that petitioners had engaged in an

"orchestrated campaign of official harassment" against her. J.A. 66-67.

3. The court of appeals reversed. J.A. 170-175. The court noted that the Equal Protection Clause "is most commonly invoked on behalf of a person who either belongs to a vulnerable minority or is harmed by an irrational difference in treatment." J.A. 170. The court held, however, that, under *Esmail*, the Equal Protection Clause "can also be invoked * * * by a person who can prove that 'action taken by the state * * * was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective.'" J.A. 170-171 (quoting *Esmail*, 53 F.3d at 180). The court concluded that respondent had adequately alleged such a violation. J.A. 172-173. The court specifically held that respondent's allegations that she and her husband had been treated differently from all other property owners only because their suit against the Village had angered Village officials were sufficient to state a claim under *Esmail*. J.A. 172.

The court of appeals rejected the district court's view that *Esmail* required proof of an orchestrated campaign of harassment. J.A. 173-174. The court concluded that such a requirement has no basis in either the language or the policy of the Equal Protection Clause. J.A. 174.

SUMMARY OF ARGUMENT

I. The question presented by petitioners is whether a person in a "class of one" can state an equal protection claim by alleging that ill will motivated the government to treat her differently from others who are similarly situated. Respondent's complaint, however, does not present that question. Respondent's complaint alleges that she is a member of a *class of five persons* who filed

a state court suit against the Village for property damage, and that ill will *generated by the lawsuit* motivated the Village to impose on the state court plaintiffs a condition for obtaining access to water not imposed on any other property owner. Accordingly, the question presented by respondent's complaint is whether a person can state a constitutional claim by alleging that she is a member of a class of persons subjected to retaliation for having filed a lawsuit.

This Court's cases provide a clear answer to that question. Under the First Amendment, the government may not retaliate against persons because they have filed a lawsuit against the government. And when the government singles out a class of persons for differential treatment based on the exercise of rights protected by the First Amendment, it violates the Equal Protection Clause as well.

Because respondent's complaint does not raise the question presented by petitioners, and because it so clearly states a claim for relief independent of the question presented, the Court may wish to dismiss the writ of certiorari as improvidently granted. In the alternative, the Court should affirm the judgment reinstating respondent's complaint without reaching the question presented.

II. If the Court reaches the question presented, it should hold that a "class of one" claim is subject to the same analysis as other equal protection claims. Thus, unless a person in a "class of one" is singled out on the basis of a suspect classification or for exercising a fundamental right, the sole inquiry is whether there is a conceivable rational basis for treating the person in the "class of one" differently from others. Once a plausible rational basis for differential treatment is identified, judicial inquiry is at an end. A court may not probe

further into the actual subjective motivation for the decision.

The court of appeals held that, even when there is not a suspect classification or a fundamental right involved, a person in a class of one can establish an equal protection violation by demonstrating that a difference in treatment was actually motivated by ill will. That actual motive analysis cannot be reconciled with the objective inquiry required by this Court's rational basis cases. The court of appeals' approach also permits any person adversely affected by a governmental decision at any level to transform an objectively legitimate decision into a potential equal protection violation. And it sanctions highly intrusive inquiries into the motivations for official action.

At the same time, petitioners err in contending that the Equal Protection Clause only protects persons who are members of identifiable groups. The text of the Equal Protection Clause focuses on the protection of individuals, not groups. Consistent with the constitutional text, this Court's cases make clear that the Equal Protection Clause affords protection to persons who are in a "class of one." We agree with petitioners that "class of one" claims have the potential to disrupt effective government. The proper response to those concerns, however, is to apply deferential rational basis review to "class of one" claims, not to constrict the reach of the Equal Protection Clause in a way that is not justified by its text or this Court's cases interpreting it.

ARGUMENT

I. THE COMPLAINT IN THIS CASE DOES NOT PRESENT THE QUESTION RAISED BY PETITIONERS

A. The Court May Wish To Consider Dismissing The Writ Of Certiorari As Improvidently Granted

Petitioners contend that the Equal Protection Clause does not protect a person who is in a "class of one." In particular, petitioners contend that a person cannot state an equal protection claim by alleging that ill will motivated the government to treat her differently from others who are similarly situated, in the absence of an allegation that the ill will was motivated by membership in a vulnerable group. Because this case arises on a motion to dismiss respondent's complaint, the allegations in the complaint must be accepted as true. *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). For reasons that may not have been apparent to the Court when it granted certiorari, the complaint in this case does not present the question raised by petitioners. The Court therefore may wish to consider dismissing the writ as improvidently granted.

1. One serious obstacle to review of the question presented is that respondent's complaint does not allege that she is a member of a "class of one." Instead, her complaint alleges that she is a member of the class of five persons who filed suit against the Village seeking monetary relief for stormwater damage to their property. J.A. 10. Respondent's complaint specifically alleges that petitioners treated the class of state court plaintiffs differently from other property owners in the Village by demanding a 33-foot easement as a condition for obtaining water from the Village. *Ibid.* Given that

allegation, respondent's complaint does not present the question whether the Equal Protection Clause protects a person who is in "a class of one."

2. The other significant obstacle to review of the question presented is that respondent's complaint does not simply allege that general ill will motivated the government to treat the state court plaintiffs differently from other property owners in the Village. Rather, her complaint alleges that petitioners treated the state court plaintiffs differently from other property owners because of ill will *generated by the state court lawsuit*. J.A. 10. According to respondent's allegations, the state court suit received substantial local press coverage that made petitioners "look bad," J.A. 6, and petitioners retaliated by imposing a condition for access to the Village water supply that petitioners did not impose on any other property owner in the Village, J.A. 10.

The question presented by respondent's complaint is therefore not whether differential treatment based on general ill will is sufficient to state a constitutional claim, but whether differential treatment based on the filing of a lawsuit is sufficient to state a constitutional claim. That latter question does not warrant this Court's review. This Court's cases already firmly establish that the government may not impose adverse treatment on individuals because they have filed a lawsuit against the government.

Specifically, the Court has held that one component of the First Amendment right "to petition the Government for a redress of grievances" is a right to file suit in court for a redress of alleged wrongs. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984); *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 741 (1983); *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S.

508, 510 (1972). That First Amendment right is protected not only against direct government restraint, but also against government conduct that deters or chills its exercise. *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972). Thus, under the doctrine of unconstitutional conditions, the government may not deny a benefit to a person based on that person's exercise of a First Amendment right, even when the person has no entitlement to the benefit. *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 674-675 (1996). For the same reason, the government may not "retaliate" against a person for having engaged in conduct protected by the First Amendment. *Crawford-El* v. *Britton*, 523 U.S. 574, 588 & n.10, 592 (1998).

Impermissible motive is a crucial element in such a First Amendment claim. Plaintiff must demonstrate that conduct protected by the First Amendment was a substantial motivating factor in the government's decision to treat the plaintiff adversely. Once such a showing is made, the burden shifts to the government to show that it would have reached the same decision in the absence of the protected conduct. *Mount Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977).

Under those settled First Amendment principles, respondent's complaint plainly states a claim for relief. The First Amendment prohibits the government from retaliating against a class of persons because they have filed a lawsuit, and that is precisely what respondent has alleged in this case. Because respondent's complaint states a claim for relief under settled First Amendment law, this case is not an appropriate vehicle for resolving the quite different question presented by petitioners.

3. In sum, because respondent's complaint alleges that she is in a class of five, rather than a "class of one," and because her complaint alleges that the persons in

her class were treated adversely based on their having filed a lawsuit, not because of general ill will, respondent's complaint does not squarely present the question on which this Court granted certiorari. The Court may therefore wish to dismiss the writ of certiorari as improvidently granted.[1]

B. If The Court Does Not Dismiss The Writ, It Should Affirm The Court Of Appeals' Judgment Reinstating Respondent's Complaint On Grounds Independent Of The Question Presented

If the Court does not dismiss the writ as improvidently granted, it should affirm the judgment of the court of appeals reinstating respondent's complaint on the ground that respondent's allegations of retaliation for the filing of a lawsuit state a claim for relief. While respondent's complaint refers only to the Equal Protection Clause and not the First Amendment, J.A. 4, under the Federal Rules of Civil Procedure, "a complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 336 (1989); *id.* at 337 n.40 (citing cases); *id.* at 354 n.40 (Supp. 1999) (same). A court is "under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Ibid.* Because respondent's allegations so clearly state a claim for relief under the First Amendment, respondent's failure to mention the First Amendment in her complaint is not fatal.

[1] Petitioners sought review based on an asserted conflict between the decision below and the Sixth Circuit's decision in *Futernick* v. *Sumpter Township*, 78 F.3d 1051, cert. denied, 519 U.S. 928 (1996), but in fact there is no conflict. In *Futernick*, the Sixth Circuit held only that an allegation of malice is insufficient to state a claim of *selective prosecution*. *Id.* at 1057-1059. *Futernick* does not purport to govern a claim like respondent's, both because it arises outside the context of selective prosecution, and because it involves the special case of malice motivated by the filing of a lawsuit. Indeed, the Sixth Circuit held that an allegation that the government has acted in order to deter or punish the exercise of a constitutional right states a claim for relief. *Id.* at 1057. Thus, even if respondent's complaint were analogized to a selective prosecution claim, respondent's allegation of retaliation for the filing of a lawsuit would be sufficient to state a claim under *Futernick*.

Moreover, while a claim like respondent's is best analyzed as a First Amendment claim, this Court has held that dissimilar treatment that is based on the exercise of a First Amendment right also violates the Equal Protection Clause. *Wayte* v. *United States*, 470 U.S. 598, 608-609 (1985); cf. *Police Dep't* v. *Mosley*, 408 U.S. 92, 95 (1972). Respondent's complaint therefore states a claim for relief under the Equal Protection Clause as well.

II. A "CLASS OF ONE" EQUAL PROTECTION CLAIM IS GENERALLY SUBJECT TO ORDINARY RATIONAL BASIS REVIEW

If the Court reaches the question presented, it should hold that a "class of one" claim is subject to analysis under traditional equal protection standards. In the ordinary "class of one" case, therefore, in which—unlike in this case—no fundamental right is at stake, the relevant inquiry is whether the alleged difference in treatment is supported by a conceivable rational basis. The court of appeals erred in sanctioning a more probing inquiry into actual motive. At the same time, petitioners' contention that the Equal Protection

Clause affords no protection to a person who is in a "class of one" is incorrect.

A. Classifications That Are Not Suspect And That Do Not Affect A Fundamental Right Are Subject To Rational Basis Review

1. The Court has only recently reiterated that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Central State Univ.* v. *American Ass'n of Univ. Professors*, 119 S. Ct. 1162, 1163 (1999). Under that highly deferential standard, the government need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger* v. *Hahn*, 505 U.S. 1, 15 (1992). Instead, a classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Thus, once a conceivable rational basis supporting a difference in treatment is identified, judicial inquiry "is at an end." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). It is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *Ibid.* A classification fails rational basis review only in the relatively rare case in which "the facts preclude[] any plausible inference" that a legitimate basis underlies the difference in treatment. *Nordlinger*, 505 U.S. at 16.

That highly deferential standard is firmly grounded in separation-of-powers considerations. Drawing lines is inherent in the legislative process, and the practical problems of government often require rough accommodations that may seem illogical, unfair, or improperly motivated. See *Heller* v. *Doe*, 509 U.S. 312, 321 (1993). If courts condemned all classifications that appeared to have one of those characteristics, government could not function. Under rational basis review, a court therefore may not "judge the wisdom, fairness, or logic of legislative choices." *Beach*, 508 U.S. at 313.

The price for observance of those fundamental limitations on the scope of judicial review is that some improperly motivated differences in treatment will escape judicial condemnation. Here, as elsewhere, the remedy for improperly motivated exercises of lawful power "lies * * * in the people, upon whom, * * * reliance must be placed for the correction of abuses committed in the exercise of a lawful power." *McCray* v. *United States*, 195 U.S. 27, 55 (1904). Unless a classification proceeds along suspect grounds or affects a fundamental right, "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Nor is there anything extraordinary about a court refraining from inquiring into whether a decision that is objectively reasonable has been undertaken with a malicious intent. That is precisely the rule that is followed in Fourth Amendment cases. *Graham* v. *Conner*, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force."). There is no reason that a court should engage in a more probing inquiry when it undertakes rational basis review under the Equal Protection Clause.[2]

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[2] Because the extent to which a court must defer to legislative choices is grounded in separation-of-powers considerations, the

2. Most of this Court's rational basis cases have involved judicial review of legislative decisions. This Court's cases make clear, however, that the same basic standard of review applies to judicial review of administrative decisions. *Nordlinger*, 505 U.S. at 15-16 & n.8 (explaining that rational basis review applies to administrative decisions and that the standard of review is no different from the one applied to legislative classifications); *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350, 352 (1918) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.").

The Equal Protection Clause does not prohibit negligent or inadvertent errors in the administration of the law; it is only implicated when there is an intentional difference in treatment. *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944); *Sunday Lake*, 247 U.S. at 353. Once such an intentional difference in treatment is shown, however, the inquiry is the same as that applicable to legislative classifications: absent proof of a suspect classification or interference with a fundamental right, the relevant

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highly deferential standard set forth above does not constrain Congress when it exercises its authority under Section 5 of the Fourteenth Amendment to enforce equal protection guarantees. Under Section 5, Congress has considerable latitude to independently examine the facts underlying a state legislative classification and decide whether, in light of those facts, the classification satisfies the basic standard of rationality or instead rests on impermissible bias. See Brief for the United States at 22-28 (discussing cases) in *United States* v. *Florida Bd. of Regents* and *Kimel* v. *Florida Bd. of Regents*, Nos. 98-796 & 98-791.

inquiry is whether the administrative classification is rationally related to a legitimate public end. *Nordlinger*, 505 U.S. at 15-16 & n.8.

Consistent with that analysis, the courts of appeals have generally upheld administrative classifications against equal protection challenge as long as they have been supported by a conceivable rational basis, regardless of the official's actual motivation for the classification. See, *e.g.*, *Reid* v. *Rolling Fork Pub. Util. Dist.*, 854 F.2d 751, 753 (5th Cir. 1988) (refusal of utility district to grant a sewage treatment commitment does not violate equal protection "if there is any basis for a classification or official action that bears a debatably rational relationship to a conceivably legitimate governmental end," even if some other nonsuspect but irrational factors may have been considered); *Front Royal & Warren County Indus. Park Corp.* v. *Town of Front Royal*, 135 F.3d 275, 289-290 (4th Cir. 1998) (in evaluating an equal protection claim based on town's refusal to provide sewer service, court considers not actual motivation for the decision but rather whether town officials "reasonably *could have* believed that the action was rationally related to a legitimate governmental interest") (emphasis added); *Wroblewski* v. *City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992) (noting in challenge to administrative action that "[t]he rational basis standard requires the government to win if any set of facts reasonably may be conceived to justify its classification"); *Mahone* v. *Addicks Util. Dist.*, 836 F.2d 921, 935, 936-937 (5th Cir. 1988) (local utility board's refusal to provide water service to plaintiff's land must be upheld if the court finds "any conceivable factual basis" for the action).

That rational basis analysis does not preclude inquiry to determine the classification on which the official

actually relied, which might be a class of vulnerable persons, such as persons with disabilities, or a class of persons who are not vulnerable, such as real estate developers. Once a court determines the classification, the inquiry then shifts to whether a rational basis exists for using that classification. At that stage, ordinary rational basis analysis precludes a direct inquiry into a government official's subjective reasons for using a particular classification, and instead sustains the governmental action if a rational basis for using that classification can be found.

3. The equal protection principles discussed above are directly applicable when a person in a "class of one" claims that a difference in treatment violates the Equal Protection Clause. Unless the person in the "class of one" is being singled out on the basis of a suspect classification, or for exercising a fundamental right, ordinary rational basis review is applicable.

For example, if a town council enacted an ordinance providing that persons generally would have to give a 15-foot easement for obtaining access to the town's water supply, but that a 33-foot easement would be required from a particular homeowner, and no suspect classification or fundamental right were involved, the relevant question would simply be whether there was a rational basis for treating that particular homeowner differently from others. If there were a conceivable rational basis for the difference in treatment, judicial inquiry would be at an end. A court would have no authority to probe further into the actual motive for the town council's decision.

The same basic approach would apply to a claim that a town's water administrator required a 33-foot easement from one particular homeowner but not others. The person in the "class of one" would first have to

show that the administrator made a deliberate decision to treat him differently from others, and that the decision was not simply the result of an inadvertent, mistaken, or negligent application of the law. Once such a showing was made, the question would be the same as in the legislative example—whether there was a conceivable rational basis for treating that particular homeowner differently from others. As long as such a conceivable rational basis could be identified, a court could not probe further into the actual basis underlying the water administrator's decision.

B. The Court Of Appeals Erred In Approving An Inquiry Into Actual Motive

1. The court of appeals in this case failed to apply those settled equal protection principles. Applying its prior decision in *Esmail* v. *Macrane*, 53 F.3d 176 (1995), the court held that a plaintiff could establish an equal protection violation by proving that a difference in treatment was actually motivated by ill will. J.A. 170-171, 173. As *Esmail* makes clear, the Seventh Circuit has concluded that a plaintiff can establish a malicious-intent equal protection claim without showing that the government has proceeded along suspect lines, affected a fundamental right, or acted without a plausible rational basis. 53 F.3d at 178-179.

The court of appeals' analysis cannot be reconciled with the decisions of this Court discussed above holding that, unless a classification is suspect or affects a fundamental right, the sole equal protection inquiry is whether there is a plausible rational basis for the classification. As we have discussed, once such a plausible basis is identified, the case is at an end. A court is not free to undertake an additional inquiry into

whether the decision was actually motivated by a malicious intent.

2. The court in *Esmail* sought to draw support for its equal protection theory from this Court's decision in *Cleburne*. *Esmail*, 53 F.3d at 179. In the Seventh Circuit's view, *Cleburne* implied that malicious intent violates equal protection "when it pointed out that some objectives of state action simply are illegitimate and will not support actions challenged as denials of equal protection." *Id.* at 179-180. The court of appeals' reliance on *Cleburne* is misplaced. While *Cleburne* makes clear that certain government objectives, such as a bare desire to harm a politically unpopular group, or a desire to accommodate private bias, are not legitimate state interests, 473 U.S. at 446-448, it does not support the court of appeals' analysis here.

In *Cleburne*, the Court held that a city that generally permitted the operation of multiple dwelling facilities violated the Equal Protection Clause when it failed to permit the operation of a group home for persons with mental retardation. Applying rational basis review, the Court held that the record failed to reveal any rational basis for the city's decision to treat the group home differently from other multiple dwelling facilities. 473 U.S. at 448. The Court examined each of the four grounds for differential treatment suggested by the city, and it concluded in each case that the asserted rationale did not afford a basis for distinguishing between the group home at issue and other multiple dwelling facilities. *Ibid.* Having failed to identify any rational basis for the city's decision, the Court concluded that the decision could only be explained as resting on irrational prejudice against persons with mental retardation, an illegitimate basis for government action. *Id.* at 450; see also *id.* at 448.

Cleburne therefore does not hold that a plaintiff can bypass rational basis review merely by producing evidence that a decision was in fact motivated by a malicious intent. Rather, it holds that a decision that is not supported by a rational basis, and therefore can only be understood as resting on an impermissible motive, violates equal protection. The Seventh Circuit therefore erred in extrapolating its equal protection theory from *Cleburne*.[3]

3. The court of appeals' holding that proof of malicious intent can establish an equal protection violation in a "class of one" case threatens important governmental interests. The court of appeals itself recognized that its decision created "the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case." J.A. 174. The court of appeals, however, understated the dimensions of the problem. Under the court of appeals' approach, virtually any objectively legitimate decision by any government actor at any level can be transformed into a potential equal protection violation if a person affected by the decision alleges that the government acted with a malicious motive.

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[3] It is possible to read *Cleburne* as applying a more rigorous form of rational basis review than the one the Court ordinarily applies. The rationale for that more rigorous application of rational basis review would be that persons who are mentally retarded satisfy some, but not all, the conditions necessary for application of heightened scrutiny. See also *Romer* v. *Evans*, 517 U.S. 620 (1996) (invalidating classification singling out persons who are gay for differential treatment). That rationale for a more rigorous form of rational basis review would not apply in the ordinary "class of one" case.

This Court has previously made clear that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). It has rejected constitutional theories that "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983." *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981). The court of appeals' decision conflicts with those admonitions.

4. The court of appeals' decision is particularly troubling because it invites highly intrusive inquiries into the motivations that underlie official action. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court specifically addressed the unique harms of motive inquiries like those sanctioned by the court of appeals. There, the Court explained that "it is now clear that substantial costs attend the litigation of the subjective good faith of government officials." *Id.* at 816. In particular, "[n]ot only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Ibid.* In addition, there are "special costs to 'subjective' inquiries of this kind." *Ibid.* Because "the judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experiences, values, and emotions," questions of subjective intent "rarely can be decided by summary judgment." *Ibid.* Moreover, when malicious intent is the ultimate issue, "there often is no clear end to the relevant evidence." *Id.* at 817. For that reason, an inquiry into malicious intent "may entail broad-ranging discovery and the deposing of numerous persons,

including an official's professional colleagues." *Ibid.* Such inquiries "can be peculiarly disruptive of effective government." *Ibid.* Based on those considerations, the Court in *Harlow* held that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-ranging discovery." *Id.* at 817-818. The court of appeals' equal protection theory, however, would have precisely that effect.

5. We do not suggest that judicial inquiries into actual motive are never justified. Specific constitutional provisions contemplate an inquiry into actual motive. See *Farmer* v. *Brennan*, 511 U.S. 825, 835-840 (1994) (Eighth Amendment); *Mount Healthy*, 429 U.S. at 287 (First Amendment). Indeed, the Equal Protection Clause itself demands such an inquiry when a classification is suspect. See *Village of Arlington Heights* v. *Metropolitan Housing Auth.*, 429 U.S. 252, 264-266 (1977) (racial discrimination). When a court is reviewing official action under the Equal Protection Clause, however, and there is no suspect classification or fundamental right involved, the costs of an actual motive inquiry outweigh any possible benefit.

Moreover, as this Court recently explained in *Crawford-El*, there is an important distinction between bare allegations of malice and the allegations of intent that are essential elements of certain constitutional claims. 523 U.S. at 592. A general allegation of malice permits "an open-ended inquiry into subjective motivation." *Ibid.* In contrast, in the contexts in which the Court has approved a motive inquiry, "the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff * * * or to deter public comment on a specific

issue of public importance." *Ibid.* It is therefore not surprising that the Court in *Crawford-El* expressed its understanding that "[i]t is obvious, of course, that bare allegations of malice would not suffice to establish a constitutional claim." *Id.* at 588. The court of appeals therefore erred in holding that an allegation of malicious intent is sufficient to state an equal protection claim.

C. The Equal Protection Clause Affords Protection To Persons Who Are In A "Class Of One"

At the same time, petitioners err in contending (Br. 15-16) that the Equal Protection Clause only protects individuals who are members of an identifiable group. While the "central purpose" of the Equal Protection Clause "is the prevention of official conduct discriminating on the basis of race," *Washington* v. *Davis*, 426 U.S. 229, 239 (1976), and "the abolition of all caste-based and invidious class-based legislation," *Plyler* v. *Doe*, 457 U.S. 202, 213 (1982), its protections also extend to those who are in a "class of one."

1. The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is "essentially a direction that all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439; *Plyler*, 457 U.S. at 216; *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). The unmistakable focus of the constitutional text is on protection for the individual. As the Court has emphasized, a "basic principle" of the Equal Protection Clause is that it "protect[s] persons, not groups." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995) (emphasis omitted).

2. Consistent with the constitutional text and that basic principle, this Court's cases do not suggest that

the Equal Protection Clause protects only persons who are members of an identifiable group. To the contrary, as early as 1879, the Court made clear that the Equal Protection Clause "means that *no person or class of persons* shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Missouri* v. *Lewis*, 101 U.S. 22, 31 (1879) (emphasis added).

The Court has on several occasions confirmed that the Equal Protection affords protection to a person in a "class of one." For example, in *Atchison, Topeka & Santa Fe Railroad* v. *Matthews*, 174 U.S. 96, 104 (1889), the Court stated that "the equal protection guaranteed by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney's fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule."

In *McFarland* v. *American Sugar Refining Co.*, 241 U.S. 79 (1916), state legislation provided that any company engaged in the business of refining sugar within the State which paid less for sugar in the State than outside the State would be presumed to be a party to a monopoly and would be subject to fines, license revocation, ouster from the State, and sale of its property. *Id.* at 81. The State defended the law on the ground that it applied only to the American Sugar Refinery and was designed to combat that company's conduct. *Id.* at 85. The Court held the law unconstitutional, explaining that the law contained a "classifi-

cation, which if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice." *Id.* at 86. The Court added that "[i]f the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it and that therefore the plaintiff should be *prima facie* presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws." *Id.* at 86- 87.

More recently, in *Wade* v. *United States*, 504 U.S. 181, 185 (1992), the Court held that a prosecutor's decision to withhold a motion to reduce a sentence based on substantial assistance is subject to the same constitutional limitations that apply to selective prosecution claims. The Court went on to state that a single individual who alleged that the prosecutor acted arbitrarily and in bad faith in withholding a motion would be entitled to a remedy "if the prosecutor's refusal to move was not rationally related to any legitimate Government end." *Id.* at 186 (citing *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976)).

The Equal Protection Clause therefore is not wholly inapplicable to a person in a "class of one." As Justice Frankfurter explained, "the Fourteenth Amendment does not permit a state to deny the equal protection of its laws because such denial is not wholesale." *Snowden*, 321 U.S. at 15 (Frankfurter, J., concurring). A violation of equal protection can occur when "conscious discrimination by a state touches the plaintiff alone." *Ibid.*

3. Petitioners argue (Pet. 24) that compelling public policy considerations justify a ruling that the Equal Protection Clause affords no protection to a person who

is in a "class of one." In particular, they argue (Pet. 24-25) that recognition of a "class of one" claim "will invite legions of claims into federal courts," since anyone who has had a bad experience with a government official can "claim that any adverse act undertaken by that public official was done with improper motivation and therefore in violation of the Equal Protection Clause."

As our previous discussion shows, we share petitioners' concerns. The proper response to those concerns, however, is to apply deferential rational basis review to "class of one" claims, not to constrict the reach of the Equal Protection Clause in a way that is not justified by its text or this Court's cases interpreting it. Thus, a person who is in a "class of one" can establish an equal protection violation, but only by showing that there is no plausible rational basis for treating the "class of one" plaintiff differently from others.[4]

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[4] As the courts of appeals have recognized, such claims can often be resolved on a motion to dismiss or a motion for summary judgment without highly intrusive discovery into an official's actual motive. See, *e.g.*, *Mahone*, 836 F.2d at 936-937 (challenge to regulatory action under rational basis test may be resolved on motion to dismiss because "using discovery procedures to develop facts showing the state's true reason for its actions could be, for all practical purposes, both inefficient and unnecessary"); *Wroblewski*, 965 F.2d at 460 (where rational basis for challenged administrative action is plausible and directly supported by the allegations in the complaint, dismissal for failure to state a claim is warranted); *E & T Realty* v. *Strickland*, 830 F.2d 1107, 1115-1116 (11th Cir. 1987) (Kravitch, J., concurring in part and dissenting in part) (arguing that because there were legitimate, rational, and identifiable grounds to justify differential treatment of plaintiffs, there was no need to remand claim for inquiry as to defendants' actual intent), cert. denied, 485 U.S. 961 (1988); see also *Crawford-El*, 523 U.S. at 597-600 (suggesting several means for a trial court to exercise its

CONCLUSION

The Court may wish to dismiss the writ of certiorari as improvidently granted. In the alternative, for the reasons stated in Part IB, the judgment of the court of appeals reinstating respondent's complaint should be affirmed. If the Court reaches the question presented, it should hold that a "class of one" claim is subject to rational basis review.

Respectfully submitted.

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DECEMBER 1999

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discretion to protect government officials from unnecessary and burdensome discovery or trial proceedings).

(4)

No. 98-1288

IN THE
Supreme Court of the United States

VILLAGE OF WILLOWBROOK, *et al.*,
Petitioners,
v.
GRACE OLECH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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3508

QUESTION PRESENTED

Whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the plaintiff does not allege membership in a protected class or group, but that "ill will" motivated the government to treat her differently than others similarly situated.

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Petitioners,
v.
GRACE OLECH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compel-

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*.

ling interest in the issue presented in this case: whether the Equal Protection Clause gives rise to a cause of action on behalf of a citizen, not a member of a protected class or group, who alleges that "ill will" motivated the government to treat her differently than others similarly situated, even when it is apparent (in this case, from the allegations of the complaint) that there is a rational basis for the challenged government action.

Although the district court dismissed respondent's complaint for failing to state a claim upon which relief can be granted, the court of appeals reversed. It ruled that perfectly rational governmental conduct can violate equal protection if it is in fact motivated by some "illegitimate animus," Pet. App. 5a, and that since such animus was alleged by respondent, this case must go forward.

Amici respectfully submit that, assuming the complaint even stated a claim upon which relief can be granted, the court of appeals committed reversible error by failing to apply rational basis review in this case. Its decision sets a dangerous precedent that, unless reversed, will stand as an invitation to the federal courts to interfere in routine decision-making by States and local governments. This Court has characterized rational basis review as "a paradigm of judicial restraint." *FCC v. Beach Communications*,

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Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Inc., 508 U.S. 307, 314 (1993). *Amici* believe that "[o]nly by faithful adherence to this guiding principle of judicial review" in cases such as this one "is it possible to preserve" to the political branches their "rightful independence" and their "ability to function." *Id.* at 315 (citation and quotations omitted).

Because of the importance of this question to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

STATEMENT OF THE CASE[2]

1. By the late 1980s respondent Grace Olech and her husband, Thaddeus Olech, had been living for many years in, and were joint owners of, a single-family home located at 6440 Tennessee Avenue, Willowbrook, Illinois.[3] Opp. App. 4a. The Olechs' neighbors on their side of Tennessee Avenue were Howard Brinkman to the north and Rodney and Phyllis Zimmer to the south. *Id.* at 5a. The portion of Tennessee Avenue adjacent to the homes of the Olechs, Zimmers, and Mr. Brinkman was not a dedicated public street and no easements adjacent to their properties had been granted to any governmental body. *Id.* at 6a-7a.

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[2] This statement is based on Mrs. Olech's second amended complaint, which is reproduced in the appendix to her brief in opposition to the petition for certiorari ("Opp. App."), and on the opinions of the district court and court of appeals reproduced in the petition appendix ("Pet. App.").

[3] Willowbrook is approximately 20 miles from downtown Chicago. Since its incorporation in 1960, Willowbrook's population has increased from 167 to almost 10,000. *See* Village of Willowbrook Community Development Department Webpage, http://www.northstarnet.org/inshome/WILLBRK/comdev/index.html (visited Nov. 7, 1999).

On August 8, 1989, the Olechs, Zimmers, and Mr. Brinkman filed a lawsuit in state court against the Village of Willowbrook in which they sought damages from Willowbrook and others as a result of flooding of their property by stormwater. On April 1, 1991, Mr. Brinkman's claims were dismissed for non-prosecution. *Id.* at 3a.

By the spring of 1995, while the Olechs' and Zimmers' lawsuit against Willowbrook was pending, but almost two years before money judgments were entered in their favor, Willowbrook had developed a plan to require all homeowners on Tennessee Avenue not already connected to the municipal water supply to hook up to it; this plan was to be implemented by the spring of 1997. *Id.* at 5a. At this time the municipal water main extended as far south on Tennessee Avenue as the northern boundary of Mr. Brinkman's property. *Id.* The Olechs' source of water was a private well on their property. *Id.* On an unspecified date in the spring of 1995, the Olechs' well broke and could not be repaired. *Id.* The Olechs' immediate response to this problem was to connect an over-ground hose to the well of their neighbors to the south, the Zimmers. *Id.*

On May 23, 1995, the Olechs, Mr. Brinkman, and the Zimmers asked Willowbrook to hook up their homes to the municipal water supply system right away. *Id.* at 5a-6a. Philip Modaff, Willowbrook's Director of Public Services, was informed that the well on the Olechs' property was broken and that the Olechs were obtaining water from the Zimmers' well via an over-ground hose, a temporary solution that would not work in the winter. *Id.* at 6a. Willowbrook undertook to extend the water main and hook

up the homes as requested, conditioned, as required by law, on the payment by the Olechs, Zimmers, and Mr. Brinkman, respectively, of one-third of the estimated cost of the project, which was paid. *Id.*

In August 1995, Modaff informed Phyllis Zimmer that Willowbrook would not proceed with the project "unless all of the property owners involved" granted Willowbrook a 33-foot easement along Tennessee Avenue. *Id.* at 7a. This information was repeated to Mrs. Zimmer that same month by Gary Pretzer, Village President. *Id.* The complaint continues:

> That on or about September 21, 1995, Defendant PHILIP J. MODAFF sent to Plaintiff GRACE OLECH and Thaddeus Olech *and to other property owners involved* a Plat of Easement whereby they *and property owners on the other side of Tennessee Avenue* would each dedicate a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities. . . .

Id. (emphasis added).[4]

Approximately seven weeks after furnishing Tennessee Avenue residents with a plat of easement indicating the 33-foot easement on property on each side of Tennessee Avenue that was to have been dedicated, paved, and improved with sidewalks, Village Attorney Gorski wrote a letter stating that "[a] fifteen foot (15′) easement, along with a temporary construction

[4] It is not alleged that the property owners on the other side of Tennessee Avenue, who were also subject to the 33-foot easement, were or ever had been plaintiffs in the pending state court lawsuit against the Village of Willowbrook.

easement of five feet (5′) on each side, *will be sufficient to install the water main.* This is consistent with Village policy regarding all other property in the Village." *Id.* at 7a-8a (emphasis added). This portion of Tennessee Avenue thereafter remained non-dedicated. *Id.* at 6a.

The communications concerning the easements resulted in a delay of the project of approximately three months. *Id.* at 9a. The water main connection to the Olechs' home was completed on March 19, 1996. On an unspecified date in November 1995, the over-ground hose connecting the Olechs to the Zimmers' well froze, depriving the Olechs of running water until the project was completed. *Id.*

On February 11, 1997, the jury in the Olechs' state court lawsuit against Willowbrook returned a verdict in Mrs. Olech's favor of $20,000. *Id.* at 3a. On the same day, the jury returned a verdict in the Zimmers' favor of $135,000. *Id.*

2. On July 11, 1997, Mrs. Olech filed a complaint in this action under 42 U.S.C. § 1983; on October 8 she filed an amended complaint.[5] Opp. 1-2. She alleged that the defendants, the Village of Willowbrook, Pretzer and Modaff, "violated her rights under the Equal Protection Clause of the Fourteenth Amendment." Pet. App. 7a (opinion of district court); *see* Opp. App. 2. Specifically, Mrs. Olech alleged that the defendants

> treated [her and her husband], Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control storm-water drainage in the vicinity to the detriment of [the Olechs], and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue.

Opp. App. 8a. Mrs. Olech characterized this treatment as "irrational and wholly arbitrary." *Id.*

Mrs. Olech further alleged that the state court lawsuit, which had been filed in 1989 and did not go to judgment until 1997, had "generated substantial ill will on the part of" the defendants in 1995. This resulted from "the coverage of the state court lawsuit in the local press which made [the Village] and its officers and employees look bad; the erroneous belief on the part of [Willowbrook's officers and employees] that the state court lawsuit was frivolous and meritless; and the fact that, prior to the filing of the state court lawsuit" in August 1989, the Olechs and Mr. Brinkman "had refused to grant certain drainage easements for a stormwater drainage project favored by" the Village. *Id.* at 4a.

3. The district court granted defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Analyzing the complaint under the legal standards set forth in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), the district court reasoned that "[e]ven accepting Olech's allegations that her state-court action generated 'ill will' in Willowbrook against her and her neighbors," it could not "conclude that the Village

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[5] At no time did Mrs. Olech seek injunctive relief under state law. *See, e.g., Arnold v. Engelbrecht*, 518 N.E.2d 237 (Ill. App. 1987).

ever 'harassed' or 'picked on' Olech and her neighbors 'out of sheer vindictiveness' as in *Esmail*." Pet. App. 13a. The court also observed that from the complaint itself, it appeared "that the reason that the Village wanted 33 feet of easement rather than 15 feet of easement was so that it would be able to install a paved public roadway along Tennessee Avenue with sidewalks and public utilities—something it apparently could not do without the additional 18 feet of space." *Id.*

4. On appeal, the court of appeals held that the Equal Protection Clause can be invoked by "a person who can prove that 'action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective.' " *Id.* at 1a-2a (quoting *Esmail*, 53 F.3d at 180). "[T]he 'vindictive action' class of equal protection cases requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant." *Id.* at 5a. Because the court concluded that the allegations of Mrs. Olech's amended complaint met this standard for purposes of a motion to dismiss, it reversed the dismissal of her action. *Id.* at 4a-5a.

As the court of appeals read the complaint, it alleged that Willowbrook told the Olechs that it would connect them to the municipal water main but required a 33-foot easement, rather than the customary 15-foot easement, in order "to widen the road on which they live[d]." *Id.* at 2a. The Village took this action, the court of appeals said, because "the Olechs earlier had sued the Village, *and obtained damages*, for flood damage caused by the Village's negligent installation and enlargement of culverts located near

the Olechs' property." *Id.* at 2a-3a (emphasis added). According to the court of appeals, the amended complaint asserted that the Village "refuse[d] to perform" its obligation to provide water to Mrs. Olech, "one of the residents, for no reason other than a baseless hatred." *Id.* at 4a.[6]

SUMMARY OF ARGUMENT

The decision below should be reversed because the court of appeals failed to apply the rational basis test to the challenged action as this Court's precedents require. It never determined whether under a set of plausible facts Willowbrook's actions furthered a legitimate governmental interest. Rather, the court ruled that otherwise perfectly rational governmental conduct that does not affect suspect classifications or fundamental rights violates the Equal Protection Clause if it is in fact motivated by some "illegitimate animus."

Under this Court's precedents, this analysis is incorrect. Under rational basis review inquiry into actual motivation is not relevant. A court need only determine that the challenged action was rationally related to a conceivable legitimate governmental interest, regardless of the government's motivation in fact. Only when reviewing government actions that impair fundamental rights or classify persons under suspect categories, like race or gender, does actual motivation become relevant.

By failing to apply the rational basis standard to the municipal actions at issue here, the decision

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[6] As is discussed *infra* at 17-18, the court of appeals appears to have based its judgment on an understanding of Mrs. Olech's allegations that is in some respects at odds with her amended complaint.

below disrupts important interests that the standard was meant to preserve. It allows plaintiffs to state an equal protection cause of action simply by alleging differential governmental treatment assertedly motivated by an illegitimate animus. The decision below thus raises the specter of burdensome, fact-driven federal litigation bogging down state and local government decision-making. Were it upheld by this Court, almost any angry citizen could proceed through discovery and present evidence to a jury simply by alleging that some illegitimate animus resulted in an uneven distribution of the benefits or burdens of civic life.

ARGUMENT

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED BECAUSE THERE WAS A RATIONAL BASIS FOR THE VILLAGE'S ACTIONS

Amici agree with petitioners that because the Equal Protection Clause prohibits discrimination against classes or groups, Mrs. Olech's amended complaint failed to state a claim upon which relief can be granted. Even were this not the case, however, the judgment of the court of appeals should be reversed because it is apparent from the allegations of the complaint that there was a rational basis for the Village's actions. This Court has "repeatedly held that a 'classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose.' " *Central State Univ. v. American Ass'n of Univ. Professors*, 119 S. Ct. 1162, 1163 (1999) (per curiam) (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)).

The court of appeals made no effort to determine whether the Village's actions could plausibly be explained as "rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam). Rather, the court ruled that a plaintiff states a claim under the Equal Protection Clause simply by alleging personal animus —"substantial ill will"—and differential treatment, and that the outcome will turn on whether the plaintiff can prove that the animus was in fact the cause of the treatment. By failing to apply rational basis review to Mrs. Olech's claim, the court below committed a fundamental error. Unless the decision below is reversed, routine governmental decisions of every sort will become the subject of federal court litigation.

A. In The Absence Of A Suspect Classification Or Fundamental Right, Courts Evaluate Equal Protection Challenges To Government Actions Under The Rational Basis Test

The Equal Protection Clause prohibits government classifications that are based upon impermissible criteria or arbitrarily used to burden groups. The Court has recognized that distinctions and classifications in the allocation of legal burdens and benefits may result in a number of ways. A law may establish a classification on its face, and in perhaps the most common type of claim a plaintiff will allege that some explicit statutory classification violates equal protection. *See, e.g., Strauder v. West Virginia*, 100 U.S. 303 (1879) (racial qualification for right to sit as juror). An equal protection claim may also arise where application of a facially neutral statute—one that contains no explicit improper classification—falls unevenly on some group. In *Yick Wo v. Hopkins*, 118

U.S. 356 (1886), for example, the Court invalidated the action of San Francisco municipal authorities in applying an ordinance banning hand laundries in wooden buildings only against Chinese-owned businesses.

The Court has repeatedly held that unless government action "provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1988). Mrs. Olech does not allege that she is a member of a protected class, or that the Village took action against her in order to interfere with her exercise of a fundamental right.[7] Her equal protection claim must therefore be analyzed under rational basis review.

Under such review, the courts are to uphold government action unless "the facts preclude[] any

[7] There are several "relatively discrete categories" of rights which this Court has determined are "fundamental" for equal protection analysis. These include the right to vote, *United States v. Classic*, 313 U.S. 299, 315 (1941); the right for each vote to have relatively equal voting strength among legislative districts under a proper apportionment scheme, *Baker v. Carr*, 369 U.S. 186, 209-10 (1962); the right to travel, *Saenz v. Roe*, 119 S.Ct. 1518, 1524-27 (1999); the freedom of association, *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); the right to privacy, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); the right to marriage, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); and the right to fairness in the criminal justice system, *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). *Cf. DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 196 (1989) ("the Due Process Clauses generally confer no affirmative right to governmental aid").

plausible inference that the reason for unequal [treatment]" is rationally connected to a proper purpose. *Nordlinger v. Hahn*, 505 U.S. 1, 16 (1992). Thus, under rational basis review, actual intent is not in issue, and government action will be upheld on the basis of conceivable facts and objectives that could plausibly exist. *See, e.g., Heller*, 509 U.S. at 320 ("classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification,'" (quoting *Beach Communications, Inc.*, 508 U.S. at 313)); *Dukes*, 427 U.S. at 303-06. Rational basis review is, in short, "a paradigm of judicial restraint," *Beach Communications*, 508 U.S. at 314, and governmental actions reviewed under this standard are afforded "a strong presumption of validity." *Id. See* Laurence Tribe, *American Constitutional Law* 1440 (2d ed. 1988).

The reasons for this highly deferential standard of review are compelling, and fully support the application of rational basis review to routine administrative decisions such as those of the Village of Willowbrook challenged here.[8] Rational basis review is predicated

[8] This Court's cases discussing rational basis review have generally arisen in the context of judicial review of legislative classifications. *But see Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.*, 488 U.S. 336 (1980) (applying rational basis review to tax assessments). The courts of appeals have, however, routinely applied rational basis review to administrative actions of state and local governments that are challenged on equal protection grounds. *See, e.g., Bannum, Inc. v. City of Fort Lauderdale*, 157 F.3d 819, 823 (11th Cir. 1998) (city's denial of special use permit did not give rise to equal protection claim where city's actions "could have" furthered legitimate state interests); *Indiana State Teachers Ass'n v. Bd. of School Comm'rs*, 101 F.3d 1179, 1182 (7th Cir.

on this Court's appreciation of the fact that "'[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations.'" *Heller*, 509 U.S. at 321 (quoting *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69 (1913)). *See also Beach Communications*, 508 U.S. at 316 n.7 (collecting cases). "Only by faithful adherence to this guiding principle of judicial review . . . is it possible to preserve to" the political branches of government their "rightful independence" and their "ability to function." *Id.* at 315 (citation and quotations omitted). Given the complexity and boundless number of the problems with which they deal, and the fact that few solutions are perfect, the political branches must be able to address the manifold problems of governance in the ways that they think are best for the citizenry as a whole—provided, of course, that their actions do not invidiously discriminate

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1996) (Posner, J.) (referring to defendant's "burden, however easy to carry, of showing that the unequal treatment had a rational basis"); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990) (denial of building permit upheld absent evidence that "'Village . . . acted irrationally'"); *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 472 (1st Cir. 1990) ("[r]ational basis analysis is . . . required" in government employee's challenge to her transfer as violative of equal protection); *Carolan v. City of Kansas City*, 813 F.2d 178, 182 (8th Cir. 1987) (allegedly "stricter" enforcement of building code was "rational" and therefore valid); *Ciechon v. City of Chicago*, 686 F.2d 511, 524 (7th Cir. 1982) (disparate treatment of two similarly situated employees violated equal protection because "the City had not even a rational basis for its disparate treatment"); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981) (state agency violated equal protection where it "failed to offer a rational justification for the different treatment accorded" terminated employee).

against fundamental rights or protected classes. *See id.*

"'[The rational basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.'" *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970)). As the Court recently reiterated with reference to legislative decisions in reasoning fully applicable to administrative determinations,

> 'The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.'

Beach Communications, 508 U.S. at 316 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)). In short, "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination." *Dandridge*, 397 U.S. at 486-87 (citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911)).

B. It Is Clear From The Allegations Of The Amended Complaint That There Was A Rational Basis For The Village's Actions

The court below wholly ignored the standard articulated in these cases, under which government action is upheld if "there is any reasonably conceivable state of facts that could provide a rational basis" for it. *Heller*, 509 U.S. at 320 (quotations omitted). Rather than inquire whether rational and legitimate explanations for the conduct were plausible, the court proceeded on the premise that actual governmental motives were dispositive. It stated the rule that if "the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus," an equal protection claim is established. Pet. App. 4a-5a.

The court professed to be "troubled . . . by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case." *Id.* at 5a. But by failing to inquire whether there was a conceivable rational basis for the Village's actions (and, *amici* respectfully submit, by failing to accurately characterize Mrs. Olech's allegations, *see infra* at 17-18), the court of appeals contributed mightily to the very outcome it lamented.

In this case, no imagination was required to identify the required rational basis for the Village's alleged conduct. The amended complaint specifically asserts that the Village demanded the additional easement in order to allow it "to control stormwater drainage in the vicinity," Opp. App. 8a, and "for the construction and maintenance of a roadway, to

include pavement, sidewalks, and public utilities."[9] It was therefore entirely appropriate for the district court to dismiss the case on the basis of the amended complaint alone.[10]

While the court of appeals did not expressly state that it was applying a standard other than rational basis review, it not only failed to inquire into conceivable justifications for the Village's conduct, but it also ignored critical allegations of the complaint. According to the court of appeals, Willowbrook agreed to connect the Olechs to the municipal water main but required a 33-foot easement, rather than the

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[9] The Village might reasonably have believed that the additional improvements were necessary and desirable for any number of reasons, and that it was less disruptive to the residents of Tennessee Avenue and other users of that road, and more cost effective, to install water main connections, pave the road, and install sidewalks at one time rather than sequentially. *See* note 3, *supra*.

[10] Dismissal was proper for the additional reason that Mrs. Olech specifically alleged *not* that she was treated differently from other persons similarly situated, but that she was treated the same as others similarly situated, *i.e.*, property owners on both sides of the portion of Tennessee Avenue that the Village hoped to improve. Opp. App. 7a.

Because it was apparent from the allegations of Mrs. Olech's amended complaint that there was a rational basis for the Village's actions and that she had otherwise failed to state a claim for violation of equal protection, the district court properly dismissed the action on the basis of the complaint alone. When it is not apparent from the allegations of the complaint that there is a conceivable rational basis for the challenged governmental action, the governmental defendants can, in response to the complaint, file a dispositive motion which sets forth a conceivable rational basis for the action, accompanied if necessary by evidentiary support. *See generally Moore's Federal Practice* § 56.30[1] (1999).

customary 15-foot easement, in order "to widen the road on which they live[d]." Pet. App. 2a. This was, the court of appeals said, because "the Olechs earlier had sued the Village, *and obtained damages*, for flood damage caused by the Village's negligent installation and enlargement of culverts located near the Olechs' property." *Id.* at 2a-3a (emphasis added). "For three months the Olechs had been treated differently, to their detriment, from all other property owners in the Village only because their meritorious suit against the Village had angered Village officials." *Id.* at 3a.

The court of appeals thus understood the amended complaint to allege that "the cause" of the Village singling out the Olechs for the wider easement was "a totally illegitimate animus toward" them, *id.* at 5a, *i.e.*, for "*no reason other than a baseless hatred.*" *Id.* at 4a (emphasis added). The court of appeals erroneously believed that this ill will was the result of the entry of a large money judgment against the Village. *Id.* at 3a. That judgment, however, was not entered until long after the events concerning the easement. *Compare* Opp. App. 3a *with id.* at 7a-8a.

The court of appeals also ignored the amended complaint's specific allegation that the Village had proposed to the Olechs *and* to other property owners on both sides of Tennessee Avenue that "each dedicate . . . a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities." Opp. App. 7a. In other words, the complaint alleged that Mrs. Olech had been treated the same as others similarly situated—the property owners on Tennessee Avenue from whom the Village sought a 33-foot easement in order to effectuate

major public works, without regard to whether they were parties to the state court suit. Such conduct, alleged by Mrs. Olech, bears no resemblance to an equal protection violation.

Amici respectfully submit that the court of appeals' decision sets a dangerous precedent that, unless reversed, will invite the federal courts to interfere in routine government decision-making in the guise of enforcing the Equal Protection Clause.[11] As this Court has repeatedly held when applying rational basis review to governmental action challenged as violative of equal protection, such deferential review—"a paradigm of judicial restraint," *Beach Communications*, 508 U.S. at 314—is necessitated by the fact that "[t]he problems of government are practical ones and

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[11] *Amici* do not dispute that cases may arise in which groups of citizens have some foundation for feeling that they have been treated by government in a manner that, as Mrs. Olech alleged in her amended complaint, is "irrational and wholly arbitrary." Opp. App. 8a. Thus, in some cases, governmental action may indeed be wholly unrelated to any legitimate government interest and violate the Equal Protection Clause. *See Allegheny*, 488 U.S. at 340.

Where, as here, that is not so, a plaintiff may have remedies under other provisions of the Constitution. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) ("[t]he touchstone of due process is protection of the individual against arbitrary action of government") (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)); *Nollan v. California Coastal Comm'n*, 482 U.S. 825, 837 (1987). In addition, remedies are undoubtedly available under state law. *Futernick v. Sumpter Township*, 78 F.3d 1051, 1059 (6th Cir. 1996) ("Regulation out of personal dislike or vendetta is repugnant to the American tradition of the rule of law. However, the states themselves are vibrant defenders of this tradition."). *See, e.g.*, Pet. Br. 29-30 (cataloguing remedies available under Illinois law).

may justify, if they do not require, rough accommodations." *Heller*, 509 U.S. at 321 (quotations omitted). "Only by faithful adherence to this guiding principle of judicial review . . . is it possible to preserve" to the political branches their "rightful independence" and their "ability to function." *Beach Communications*, 508 U.S. at 315 (citation and quotations omitted).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Petitioners,

v.

GRACE OLECH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE ACLU AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights.[1] The ACLU of

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.3. Under Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Illinois is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amici curiae*. In particular, the ACLU has established equality of treatment by government for all persons as one of its primary concerns and therefore has participated in many of the Court's equal protection cases. Because this case will decide whether the Equal Protection Clause tolerates a public official singling out an individual for discriminatory treatment, its proper resolution is a matter of concern to the ACLU and its members.

STATEMENT OF THE CASE

Respondent Grace Olech and her now-deceased husband Thaddeus Olech lived for many years at 6440 Tennessee Avenue in Willowbrook, Illinois. App. 6. Their neighbors on Tennessee Avenue were Howard Brinkman to the north and Rodney and Phyllis Zimmer (the Olechs' daughter and son-in-law) to the south. *Id.* at 7. On August 8, 1989, the Olechs, Zimmers, and Mr. Brinkman filed a lawsuit in state court against the Village of Willowbrook, seeking damages for flooding that resulted from improper drainage of storm water. *Id.* at 5. The lawsuit received local press coverage that made Petitioners "look bad." *Id.* at 6. Although Mr. Brinkman's suit was dismissed for want of prosecution, the Olechs and the Zimmers won their lawsuit. *Id.*

For years, the Olechs, Mr. Brinkman, and the Zimmers obtained their water from private wells on their respective properties. In the spring of 1995, the Olechs' well broke and could not be repaired, and on May 23, 1995, the Olechs, along with their Tennessee Avenue neighbors, asked Willowbrook to connect their homes to the municipal water supply "right away." App. 5-6. At this time the municipal water main extended as far south on Tennessee Avenue as the northern boundary of the northern edge of Mr. Brinkman's property, *i.e.*, the northernmost property of the

three neighbors. *Id.* at 7. When the Olechs made their May 1995 request their lawsuit against Willowbrook was pending.

Willowbrook refused to connect them, even though the residents had already paid the cost of doing so as required by law, unless each of them granted Willowbrook an easement to a 33-foot strip alongside their property and Tennessee Avenue. *Id.* at 12. This demand was contrary to, in Willowbrook's own words, Willowbrook's "policy regarding all other property in the Village" of a 15-foot easement for connection to the water main. *Id.* at 10. The Olechs refused to accede to this demand; Willowbrook eventually withdrew it in November 1995. *Id.* at 11.

Willowbrook had earlier requested that the Olechs grant the Village drainage easements for a stormwater drainage project, but the Olechs had refused then too. *Id.* at 6. Thus Willowbrook took advantage of the opportunity presented by the Olechs' request to be connected to the water supply by again demanding an easement that would allegedly be used to create a dedicated public street and "to control stormwater drainage . . . by the use of ditches and swales along Tennessee Avenue." *Id.* at 10. Ms. Olech contends that Willowbrook made this unprecedented easement demand in order to "get back" at her and her Tennessee Avenue neighbors for the lawsuit and its accompanying embarrassment for the officials. *Id.*

Because of Willowbrook's unprecedented demand for an easement, the Olechs were forced to obtain water from Mr. Brinkman's well using an overground hose. *Id.* at 8. The Olechs told Petitioner Philip Modaff, Willowbrook's Director of Public Services, that their temporary water supply would not work in the winter when the hose froze. *Id.* In November 1995 the hose did in fact freeze, and the Olechs' home was thereafter without water until weather conditions allowed the project to be completed in March 1996. *Id.* at 12.

Ms. Olech filed suit in the United States District Court for the Northern District of Illinois, claiming that Petitioners had violated her rights under the Equal Protection Clause. The district court granted Petitioners' motion to dismiss, but the Seventh Circuit reversed. The Seventh Circuit held that Ms. Olech's claim that she was treated differently from other Willowbrook residents as a result of Petitioners' vindictiveness adequately stated a claim.

SUMMARY OF ARGUMENT

There is no dispute that if Ms. Olech's allegations are true, what Willowbrook did was wrong. The whim of one or two vindictive public officials should not dictate whether a resident obtains access to her municipal water supply. As this Court has already recognized, singling out an individual can constitute a denial of equal protection under the Fourteenth Amendment to the Constitution.

Moreover, the predictable "public policy" arguments raised by Petitioners as a basis for denying Ms. Olech's claim have already been rejected by this Court. This Court has already held, for example, that a person denied equal protection in executive action need not seek redress in state court before claiming an equal protection violation. And it has failed to preclude equal protection claims simply because proving the claim may involve the task of demonstrating the government actor's motive. Finally, it has not surrendered to Petitioners' fear that interpreting the Constitution in a way that allows redress for victims of constitutional violations places an unacceptable burden on our governmental and legal systems. Because Petitioners do not and can not provide any meaningful distinctions between the equal protection claims previously allowed by the Court and the present one, the Court should not re-evaluate Petitioners' policy arguments in this context.

Petitioners' last ditch effort to preclude Ms. Olech's relief is a weak attempt to justify their decision to treat her unequally. But the Court has consistently recognized that even under its most deferential standard of review, governmental action should be taken only for a legitimate purpose. If Ms. Olech proves her allegations, she will have established that even this most fundamental requirement has not been satisfied and thus no further review of Petitioners' actions will be necessary.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE PROTECTS ALL CITIZENS FROM VINDICTIVE UNEQUAL TREATMENT.

The Equal Protection Clause prohibits the government from "deny[ing] to *any person* . . . the equal protection of the laws." U.S. Const. amend. XIV (emphasis added). Ms. Olech asks a federal court to enforce her right to be given a benefit enjoyed by all other Willowbrook residents—the right to be supplied with water from Willowbrook's municipal water supply—on the ground that Willowbrook treated her differently and denied her this municipal service simply out of a desire to cause her harm. Willowbrook defends these actions by blithely claiming that unequal treatment based upon sheer vindictiveness is totally outside the reach of the Equal Protection Clause. (Pet. Brf. at 20.) According to Willowbrook, the Equal Protection Clause is reserved exclusively for such broad classes as racial minorities and women. Neither the text of the Clause nor this Court's jurisprudence warrants such a crabbed reading.

The idea that the Equal Protection Clause prohibits government officials from treating citizens differently without regard to whether the victim is a member of an objectively definable class (*i.e.*, a so-called "class of one") did not originate with the lower court. In *McFarland v.*

American Sugar Refining, 241 U.S. 79, 86-87 (1916), the Court invalidated on equal protection grounds a statute that "bristle[d]" with "severeties that touch[ed] the plaintiff alone." Approximately thirty years later, in *Snowden v. Hughes*, 321 U.S. 1 (1944), the Court recognized that an individual could claim that a public official had violated the Equal Protection Clause by purposely singling him out. Shortly thereafter Learned Hand, writing for the Second Circuit in *Burt v. City of New York*, 156 F.2d 791 (1946), upheld an equal protection claim alleging that an individual had been treated differently by public officials because they disliked him.[2]

In more recent years, the Court has recognized explicitly that a "class of one" deserves constitutional scrutiny. *See Nixon v. Administrator of General Serv.*, 433 U.S. 425 (1977). In *Nixon*, the Court held that legislation directed at President Nixon was not an unconstitutional Bill of Attainder even though it disfavored him as an individual, because he "constituted a *legitimate* class of one." *Id.* at 472 (emphasis added). The Court also has acknowledged the parity between the Bill of Attainder Clause and the Equal Protection Clause. *See, e.g., id.* at 471 n.33 (explaining that the same result would be reached under either the Bill of Attainder Clause or the Equal Protection Clause); *McFarland*, 241 U.S. 79 (analyzing what is, in actuality, a Bill of Attainder claim under the Equal Protection Clause); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (pointing to the Bill of Attainder decision in *United States v. Brown*, 381 U.S. 437 (1965), in discussing equal protection "strict scrutiny"). *See also Falls v. Town of Dyer*, 875 F.2d 146 (7th Cir. 1989) (suggesting that executive action is properly analyzed under the Equal Protection Clause if as legislative

[2] In addition, the Court has long had no trouble holding that individual taxpayers have claims under the Equal Protection Clause when they are intentionally singled out to pay higher taxes. *See, e.g., Allegheny Pittsburgh Coal v. Webster County, W. Va.*, 488 U.S. 336 (1989); *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441 (1923).

action it would constitute a Bill of Attainder); Akhil R. Amar, *Essay: Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203 (1996). A "class of one" deserves scrutiny under the Equal Protection Clause.

As Judge Posner acknowledged in rejecting an argument that the Equal Protection Clause only protects large, objectively definable classes: a class "can consist of a single member, or of one member at present; and it can be defined by reference to the discrimination itself. To make 'classification' an element of a denial of equal protection would therefore be vacuous. There is always a class." *Indiana State Teachers Ass'n v. Board of School Comm'n of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996) (citations omitted) (citing *Nixon*).[3] Other circuit courts have similarly recognized the "class of one" as sufficient to state an equal protection claim. *See, e.g., Batra v. Board of Regents of the Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir. 1996) (relying on *Snowden* and holding that "the relevant prerequisite is unlawful discrimination, not whether plaintiff is part of a victimized class"); *Smith v. Eastern N.M. Medical Ctr.*, No. 94-2213, 1995 U.S. App. Lexis 35920, at *15-25 (10th Cir. Dec. 19, 1995) (reversing district court dismissal of equal protection claim where plaintiff alleged individually-based purposeful discrimination); *Yerardi's Moody Street Rest. & Lounge v. Board of Selectmen of Randolph*, 878 F.2d 16, 21 (1st Cir. 1989) (holding that an individual can claim a denial of equal protection if he was treated differently out of "malicious or bad faith intent to injure"); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981) (finding violation of Equal Protection Clause where plaintiff had individually been singled out); *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d. Cir. 1980) (allowing equal protection claim where plaintiff

[3] Were it otherwise, a legislature could avoid the prohibition on Bills of Attainder simply by passing a law that purported to govern a "class," where the "class" was defined so narrowly as to encompass only one individual.

alleges "selective treatment" based on "malicious or bad faith intent to injure").

Ms. Olech is a victim, just as much as members of other unpopular groups, of differential treatment at the hands of a governmental actor for reasons patently offensive to traditional notions of fairness and justice. The Equal Protection Clause exists to protect citizens from precisely such improperly motivated governmental action. Differential treatment in government action motivated by the desire to punish one based on personal animus should not be countenanced any more than race or sex-based discrimination when it comes to the Equal Protection Clause. Indeed, one wonders why government—at least, good government—would want to argue otherwise. "If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court." *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995). *See also Yick Wo v. Hopkins*, 118 U.S. 356, 369-70 (1886) ("When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."). Here Willowbrook officials injured Ms. Olech by denying her water because they did not like her, which created the same practical harm as if they had denied her water because she is female. But the Equal Protection Clause "state[s] a commitment to the law's neutrality where the rights of persons are at stake." *Romer*, 517 U.S. at 623.

Moreover, the human experience tells us that one need not be a member of a "suspect class" (or any type of typical class) to be politically disfavored or singled out for unfair treatment. Indeed, governmental action that burdens only a few persons may require special scrutiny because it likely

carries fewer political consequences. As Judge Posner has explained, "classifications should be scrutinized more carefully the smaller and more vulnerable the class is. A class of one is likely to be the most vulnerable of all . . . ." *Esmail*, 53 F.3d at 180. As this Court has recognized, "a status-based [governmental action] divorced from any factual context from which [the Court can] discern a relationship to legitimate state interests . . . is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer*, 517 U.S. at 635.

II. THE COURT HAS ALREADY REJECTED WILLOWBROOK'S "PUBLIC POLICY" ARGUMENTS.

A. Federal Courts Should Hear Equal Protection Claims.

Petitioners contend that Ms. Olech must go to state court for relief. Petitioners answer their own argument, however, by noting that the Equal Protection Clause was enacted, in part, because "there was significant concern that state governments would be unable or unwilling to safeguard a citizen's civil rights." (Pet. Brf. at 19.) Or as the Seventh Circuit has observed: "Although the courts of Illinois seem to have been perfectly ready, willing, and able to protect [the plaintiff] against Mayor Macrane, powerful state or local officials are not infrequently able to overawe state or local courts." *Esmail*, 53 F.3d at 180.

Moreover, this Court has steadfastly rejected the assertion that a plaintiff should be required to ask a state court for relief before asserting a constitutional claim in federal court. *See Patsy v. Board of Regents of Fla.*, 457 U.S. 496 (1982). The Court has done so for good reason. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from

unconstitutional action under color of state law, *whether that action be executive, legislative, or judicial*." *See Patsy*, 457 U.S. at 503 (internal quotation marks omitted) (emphasis added).

Petitioners' argument that Ms. Olech's equal protection claim should be shoehorned into a due process analysis that would require exhaustion of state remedies is unpersuasive. (Pet. Brf. at 31.) ("Respondent's failure to avail herself of state remedies precludes a denial of equal protection.") This Court has held that a citizen cannot claim that a state did not provide him procedural "due process" until he has availed himself of the process provided by the state. *See Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990). It makes no sense, however, to find that an "equal protection violation does not occur until the claimant shows that the state apparatus sustained or otherwise failed to rectify the equal protection denial." (Pet. Brf. at 32.) Indeed, Petitioners' argument is nothing more than an indistinguishable species of the exhaustion argument rejected in *Patsy*. No principled distinction can be drawn between Petitioners' proposal for equal protection claims and a requirement that all constitutional claims be first exhausted through the state court system, the argument rejected in *Patsy*, 457 U.S. at 516.

The shallowness of Willowbrook's argument is further illustrated by the state court remedies they say Ms. Olech has at her disposal: mandamus and substantive due process. (Pet. Brf. at 29-30.) Mandamus is of course a remedy rarely afforded even though it almost always involves egregious conduct. State court mandamus is no doubt theoretically "available" for all kinds of constitutional violations; it is not, however, a substitute for relief in the federal courts. As to substantive due process, Ms. Olech should not be relegated to that route any more than any other equal protection claimant. *Esmail*, 53 F.3d at 180.

B. Vindictiveness Is No More Impossible To Discern Than Racial Bias.

Petitioners also protest that vindictiveness is "easy to allege and impossible to discern." (Pet. Brf. at 7.) Not true. The Court has already rejected Petitioners' notion that the task of ascertaining the motives of a government actor for purposes of adjudicating an equal protection claim is too difficult for courts to manage. *See, e.g., Washington v. Davis*, 426 U.S. 229, 238-46 (1976);[4] *Batson v. Kentucky*, 476 U.S. 79 (1986); *Castaneda v. Partida*, 430 U.S. 482 (1977). *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). This Court has recognized that courts can and should ascertain legislative motive when adjudicating an equal protection claim. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev.*, 429 U.S. 252, 266-268 (1977). Moreover, most claims in the nature of Ms. Olech's will involve *ad hoc* actions by one or a few government agents. In these circumstances a factfinder's task in ascertaining motive will be much *easier* than ascertaining the motives of a legislative body, which may have divergent motives among the individual members. *Id.* at 265; *see also Kassel v. Consolidated Freightways*, 450 U.S. 662, 702-03 (1981) (noting difficulty with belief that a legislative body's motive can be ascertained because "it assumes that individual legislators are motivated by one discernible 'actual' purpose, and ignores the fact that different legislators may vote for a single piece of legislation for widely different reasons") (Rehnquist, J., dissenting). Again, however, Petitioners point to no distinguishing feature of Ms. Olech's claim that would make a court's task of determining Petitioners' motive here more burdensome. *See Smith v. Wade*, 461 U.S. 30, 56 (1983) (allowing

[4] Petitioners' lengthy discussion of *Palmer v. Thompson*, 403 U.S. 217 (1971), is unavailing. As the Court noted in *Washington v. Davis*, courts routinely look at the actor's motivation in assessing an equal protection claim. *See* 426 U.S. at 242-46.

punitive damages under § 1983 where claimant proves that defendants' conduct was "motivated by evil motive or intent").

All equal protection plaintiffs, even those belonging to suspect classes, bear the burden of proving the governmental actor's illicit motives. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 465-66 (1996); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974). Ms. Olech's burden is no different, and if she does not satisfy it, she will not prevail.

C. Allowing Ms. Olech To Prosecute Her Claim Will Not Open The Floodgates For Meritless Equal Protection Claims.

As the companion to their argument that Ms. Olech's equal protection claim is novel, Petitioners make the predictable argument that recognition of her claim will burden the "system" with "legions of claims." (Pet. Brf. at 24.) First, this "opening of the floodgates" kind of argument has never provided—and should never provide—a basis for sacrificing important constitutional rights. *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (explaining that "judicial overload" is an "inherently self-interested concern [that] has no appropriate role in interpreting the contours of a substantive constitutional right") (Blackmun, J. concurring). After all, to the extent the preservation of civil liberties entails costs, the judgment was made long ago that the costs were justified by the benefits.

In any event, Petitioners grossly exaggerate the costs likely to flow from vindication of Ms. Olech's equal protection rights. Petitioners would have one believe that affirmance of the Seventh Circuit will result in a rush on the federal courts of new (and, Petitioner's imply, frivolous) claims. Scrutiny of these dire premonitions, however, shows them to be hollow. Consider the exceptional set of facts that

will support a claim like Ms. Olech's. Such a claim requires proof that governmental action was the product of a spiteful effort to cause harm "wholly unrelated to any legitimate state objective." *Esmail*, 53 F.3d at 180. As long as government officials make legitimate choices, their decisions are unlikely to lead to a deluge of lawsuits. *See O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 724-25 (1996).

In addition, the Court has already created a framework to balance the burden of constitutional litigation against the rights of victims. Municipalities, for example, are not held strictly liable for the constitutional torts committed by their officials. *Monell v. Department of Social Serv.*, 436 U.S. 658, 692 (1978). In the context of the claim at issue here, a municipality is likely to be liable only when it either had an explicit policy authorizing the discrimination, *id.* at 690-94 or indiscriminately delegated authority to an official who, without standards to govern his execution of that authority, vindictively discriminated, *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 482 (1986). In this way, the Court has defined liability so as to adequately protect government while deterring governmental actors from engaging in invidious discrimination. Public officials who abuse their power by treating a citizen unequally in an effort to "get back" at him do not deserve protection from liability any more than those who discriminate based upon race, sex, ethnicity, or religion. And while *Burt* has been around since 1946, the paucity of reported cases on this form of claim belies Petitioners' contention that allowing Ms. Olech to proceed with her claim will cause the federal courts to be awash in similar claims. *See Esmail*, 53 F.3d at 179.

In the final analysis though, whether claims like Ms. Olech's remain rare or not is not really the point. Whenever a governmental actor either is given unbridled discretion to single one out for spiteful treatment or acts wholly outside his delegated authority, the law ought to have no interest in shielding that person from equal protection liability.

Petitioners argue that "compelling public policy" requires rejection of Ms. Olech's claim. (Pet. Brf. at 24.) But the exact opposite is true. Rejection of Ms. Olech's claim provides unwanted protection for patently vindictive governmental conduct; recognition of her claim promotes good government.

III. WHERE THE DISPARATE TREATMENT SERVES NO LEGITIMATE PURPOSE, NO LEVEL OF SCRUTINY CAN BE SATISFIED.

Governmental action "must bear a rational relationship to a legitimate governmental purpose." *Romer*, 517 U.S. at 635. Ms. Olech's claim is that Petitioners acted not to fulfill any such legitimate purpose but instead to harm her because they disliked her. "[I]f the constitutional conception of 'equal protection of laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) ("To withstand equal protection review, legislation that distinguishes between [people] must be rationally related to a *legitimate* governmental purpose.") (emphasis added). Here, Petitioners allegedly acted only out of a desire to harm the Olechs; *i.e.*, an illegitimate purpose. Therefore Petitioners' conduct by definition cannot satisfy even a rational relationship test, since it sought to advance an *illegitimate* governmental purpose. "[S]ome objectives—such as 'a bare desire to harm a politically unpopular group'—are not legitimate state interests." *Cleburne*, 473 U.S. at 446-47 (*quoting Moreno*, 413 U.S. at 534).[5]

[5] Even if Petitioners could articulate a more legitimate purpose for their actions, it would be difficult for them to show that the means they chose to fulfill their purpose were rational once Respondent proves that Petitioners acted out of vengeance, an inherently irrational circumstance.

The post-hoc and non-record contentions of Petitioners and their *amici* that there were valid reasons after all for conditioning Ms. Olech's access to water on receiving an easement from her and her neighbors do not warrant reversal of the Seventh Circuit. As that court held, to affirmatively prevail Ms. Olech must prove "that the cause of the differential treatment of which [she] complains was a totally illegitimate animus toward [her] . . . . If [Petitioners] would have taken the complained-of action anyway, even if [they] didn't have the animus, the animus would not condemn the action." Pet. App. at 174. *See also Texas v. Lesage*, No. 98-1111, 1999 U.S. Lexis 8014, at *5 (Nov. 29, 1999) ("Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.") (per curiam). Affirmance of the Seventh Circuit leaves Petitioners free to present proof of what they contend is the "real" reason for their actions at the appropriate time. If, however, Ms. Olech succeeds in showing that Petitioners' actions were based on vindictiveness rather than a rational attempt to serve a legitimate government objective, the Equal Protection Clause should afford her a remedy. *See Bankers Life & Cas. v. Crenshaw*, 486 U.S. 71, 83 (1988) ("[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review.").

CONCLUSION

Recognizing the existence of claims such as Ms. Olech's is important. There are instances when government officials seek to "get back" at a person or to retaliate for reasons that are reprehensible and illegitimate but not related to the person's exercise of a protected right. In such circumstances, no other federal claim will lie for the denial of equal treatment. The Equal Protection Clause "has long been understood to provide a kind of last-ditch protection

against governmental action wholly impossible to relate to legitimate governmental objectives." *Esmail*, 53 F.3d at 180.

Similarly, irrational and vengeful discrimination against an individual may in reality be class-based discrimination that is simply not immediately self-evident. The victim may, for example, just happen to be the first member of a vulnerable group to suffer the discriminatory treatment. Or the person may be the applicant for a government job whose employment would violate the silent quota limiting women or racial or ethnic minorities to existing numbers in the workforce. In either instance it might be difficult to plead or prove traditional class-based animus but still be possible to show treatment that departs so dramatically from the norm as to show, at the very least, personal vindictiveness that cries out for redress by the federal courts.

In short, "[i]f the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court." *Id.* at 179. For all of these reasons, the judgment of the United State Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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